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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 296.

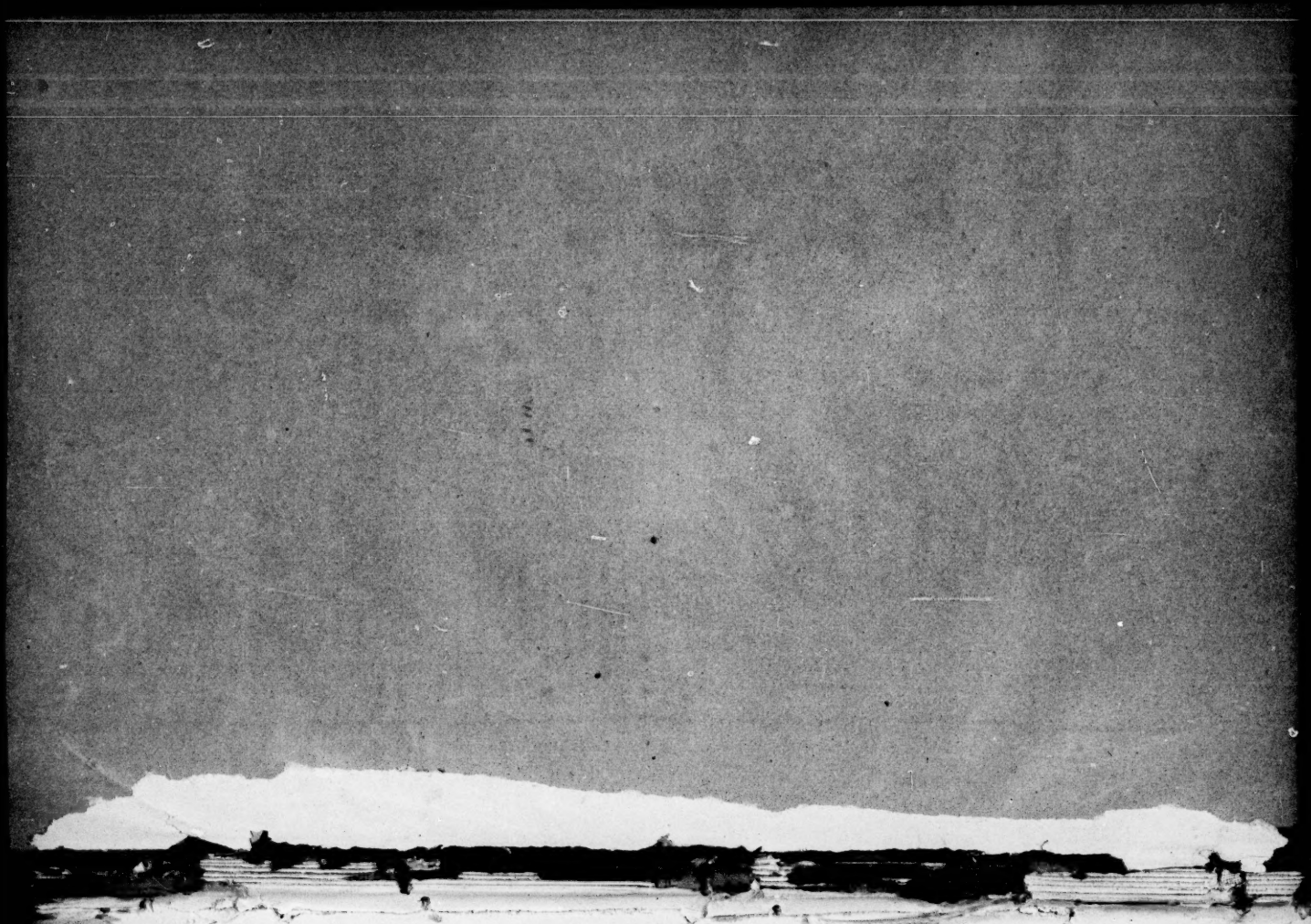
LOREN GIDDINGS AND LEANDER GIDDINGS, ADMINISTRATORS OF SILAS GIDDINGS, DECEASED, APPELLANTS,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1877.



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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Thursday the twelfth day of April in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and first year.

WILLIAM H. BRADLEY,
Clerk.

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN LIFE INSURANCE COMPANY of Milwaukee.
} In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 15th day of December, A. D. 1873, came the said defendant by Mess'rs Hoyne, Horton and Hoyne, its so-
2 licitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, its transcript of the record of the proceedings had in said entitled cause in the circuit court of Warren County in the State of Illinois, which said transcript is in the words and figures following, to wit:

TRANSCRIPT OF PROCEEDINGS IN THE CIRCUIT COURT OF WARREN COUNTY, ILLINOIS.

Transcript of proceedings in a certain cause late pending in the circuit court of Warren County, Ills., on the chancery side thereof, wherein Loren Giddings et als. were complainants and the Mutual Life Insurance Company was defendant, to wit:

Placita.

UNITED STATES OF AMERICA,
State of Illinois, Warren County, ss:

In circuit court. To December special term, A. D. 1873.

Pleas before the honorable Arthur A. Smith, judge of the eighth judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of said Warren County, and at a special term thereof convened by order of the said court, entered of record at the September term, 1873, of this court, and which said special term was begun and held at the
3 court-house in the city of Monmouth in said Warren County on the first Monday, being the first day of the month of December in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-seventh.

Present, Hon. Arthur A. Smith, judge aforesaid.
" John Porter, master in chancery.
" William L. Cuthbert, sheriff.
" William Marshall, States att'y.

Attest: JAMES L. DRYDEN, *Clerk.*

Be it remembered that heretofore, to wit, on the 4th day of September, 1873, the complainants above named *complainants* filed their bill of complaint against said defendants, upon which a summons was issued and the said cause entered upon the docket of the court.

And afterwards, to wit, upon the 4th day of said December special term, being the 4th day of said month of December, the following was entered of record in the above-entitled cause, to wit:

LOREN GIDDINGS ET AL.
vs.
THE MUTUAL LIFE INSURANCE COMPANY. } 106. Chancery.

4 This day come Mess'rs Hoyne, Horton and Horton, who enter the written appearance of said defendant herein, and present to the court a petition, bond, affidavit, stipulation, &c., asking that this cause be transferred from this court to the United States circuit court in and for the northern district of the State of Illinois. And it appearing to the court that a stipulation for the said transfer had been entered into by the attorneys for both complainants and defendant, and the solicitors for said complainants, by John J. Glenn, now agreeing to said petition in open court, it is therefore ordered, adjudged, and decreed by the court that the prayer of said petition be granted, and that this cause be transferred from the eighth judicial circuit of the State of Illinois and from the circuit court of Warren County, Illinois, to the United States circuit court in and for the northern district of the State of Illinois.

And it is further ordered by the court that the clerk of this court make out a full and complete transcript of all the proceedings of record in this cause, certify and transmit the same together with all papers and files of the court pertaining to or forming a part of the record in this cause to the clerk of said United States circuit court without delay.

5 STATE OF ILLINOIS,
Warren County, ss:

I, James L. Dryden, clerk of the circuit court in and for said county of Warren and State of Illinois, the same being a court of general jurisdiction and having a seal, do hereby certify the above and foregoing to be a full, true, and perfect transcript of all the proceedings of record in the above and foregoing entitled cause, and that the papers herewith transmitted, numbered one and two, are all the papers now on file in my office belonging to said cause.

In witness whereof I have hereunto set my hand and the seal of said circuit court at Monmouth in said county this 10th day of December, A. D. 1873.

[SEAL.] JAMES L. DRYDEN,
Circuit Clerk.

(Endorsed:) Filed Dec'b. 15th, 1873. Wm. H. Bradley, cl'k.

(1.)

STATE OF ILLINOIS,
Warren County, ss:

In the circuit court of Warren County, September term, A. D. 1873.

To the honorable Arthur A. Smith, circuit judge of the eighth judicial circuit of the State of Illinois.

Humbly complaining, showeth unto your honor your orators, Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, of Warren County, in the State of Illinois.

That in the months of August and September, A. D. 1872, one Peyton Roberts and Hubbard, doing business under the name and style of Roberts and Hubbard, were the local agents of the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, a corporation organized under and by virtue of the laws of the State of Wisconsin, but carrying on the life insurance business also in the State of Illinois.

That said Roberts and Hubbard were the duly authorized agents of said company, an incorporation in the county of Warren and State of Illinois, and were by said corporation duly empowered to take applications for life insurance, and also for loans of money in which said corporation was also engaged, and generally to attend to the insurance
7 and loaning business of said company in the limits of the county of Warren.

That while said agents were so acting in said capacity for said corporation, and while said corporation was duly prosecuting its life insurance and loaning business in the State of Illinois, and in the county of Warren, application was made to said Roberts and Hubbard on or about the 19th day of August, 1872, and through them, as such agents, to said Northwestern Mutual Life Insurance Company for a policy upon the life of said Silas Giddings by said Silas Giddings during his lifetime, and also for a loan of five thousand dollars ($5,000) from said company to said Giddings. The amount of insurance to be secured by the life policy to said Silas Giddings to be the sum of five thousand dollars ($5,000).

Your orators further state that on or about the 19th of August, 1872, the application for said life insurance by said Silas Giddings made in due form as required by the regulations and rules of said company, and subscribed by him was furnished to said agents, said Peyton and Roberts, and it was then and there agreed by and between said company, through said agents and said Giddings, that in case said several
8 applications for life insurance and for said loan should be accepted by the company, that the premium to be paid for the policy should be deducted from the money loaned and the balance paid to said Silas Giddings.

And agreeably to the rules and customs of said company said applications were by said local agents, at the request of said Silas Giddings, presented to the general agents of said company, J. E. Dean and Oscar Payne, doing business under the firm name of Dean and Payne, for said corporation, and being the general agents of said corporation for the State of Illinois, their office being located in the city of Chicago in said State. That said application for life insurance was duly received and accepted by said general agents, said Dean and Payne, on the 19th of August, and both the application for said life insurance policy and for

said loan of five thousand dollars after having been duly received by said Dean and Payne from said local agents in Warren County were by said Dean and Payne duly forwarded to the general home office of said corporation in the city of Milwaukee, and State of Wisconsin, where the general business of said company was carried on.

9 And your orators further show unto your honor that afterwards, in the latter part of August, 1872, or the fore part of September following, and prior to the fourth day of September, 1872, and prior to the death of said Silas Giddings—but the precise date your orators are unable to state with accuracy—the said Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, having duly received at said home office said applications respectively for life insurance upon the life of said Silas Giddings in the sum of five thousand dollars, and for a loan to said Giddings in the like sum of five thousand dollars, formally acted upon both of said applications and duly accepted each of them respectively, and directed the issuing of said policy to said Silas Giddings, and the granting and consummation of said loan to him each in the sum and to the extent of five thousand dollars, and advised their general agents, said Dean and Payne, thereof, and sent notice of acceptance of said applications through their said agents to said Giddings, to be by them and by said Roberts and Hubbard, said local agents in Warren County, communicated to said Giddings, and directed and ordered the necessary papers to be prepared and forwarded to said Giddings; and so your orators charge that prior to the death of

10 said Silas Giddings, a due and valid contract for insurance in the sum of five thousand dollars was duly made between said Silas Giddings and said insurance company and corporation aforesaid, as well as also between said parties a valid contract for a loan of five thousand dollars, being the same sum which was to be secured by the life policy aforesaid, agreed to be delivered to said Silas Giddings by said company.

And your orators further state that during all of said time said Silas Giddings was ready and willing to fulfil, carry out, and consummate in all respects the contracts aforesaid entered into between him and said company. That he was able, ready, and willing, and his administrators since his death have also stood ready, able, and willing, and offered and tendered full performance on their part by tender and offer of the premium and necessary securities required upon said loan to fulfil each of said contracts on their part.

Your orators further state that on the fourth day of September, A. D. 1872, said Silas Giddings died, and that said corporation and insurance company did not prior to his death, nor have they since, ever

11 offered or tendered any policy of insurance in conformity with said contract so made between said company and said Giddings, nor have they loaned or offered to loan the money aforesaid so agreed to be loaned, but have wholly and emphatically refused to carry into effect said contracts or either of them, and have refused to accept the premium upon said policy, although tendered to them by said administrators of said Silas Giddings, and have wholly repudiated said contracts and each of them, and all obligation, legal or equitable, to deliver said policy, and denied utterly the existence of any valid or binding contract between said Silas Giddings and said company, and denied any delay on their part, either to issue said policy or to pay the five thousand dollars to be secured thereby, although as your orators charge said company were duly bound to issue said policy and to pay said five thousand dollars to the executors of the estate of said Silas Giddings.

Your orators therefore pray, inasmuch as they have no adequate remedy at law, the interposition of this court as a court of equity; that a summons in chancery issue against said Northwestern Mutual
12 Life-Insurance Company of Milwaukee, Wisconsin, said corporation, returnable at the next term of this court, to answer the complaint of your orators, and that said corporation, by its president and general officers, under their corporate seal, may be compelled to answer under oath this your orator's bill, and to state specifically, under oath, precisely what action was had and taken by said company upon said application for said policy, and upon said application for said loan, and the exact date thereof, and to give an exact copy from the books and records of said corporation of said action and of all that appears upon said books and records pertaining to said policy and said loan and the several applications therefor, together with the date of each entry and copy from said books and records.

And your orators further pray that upon a final hearing of this cause a decree may be made directing and requiring said corporation to issue the policy upon the life of said Silas Giddings aforesaid in the sum of five thousand dollars to your orators as the administrators of his estate, and that a further decree may be made requiring said corporation to pay to your orators, as such administrators, the sum of five thousand
13 dollars pursuant to the terms of said contract under the provisions of said policy to which said Silas Giddings, by the provisions of the contract, was entitled.

And your orators further pray that such other and further relief may be granted as to your honor may seem meet, and that the defendant may be required to pay the costs of this suit. And your orators, as in duty bound, will ever pray.

MILLER AND FROST AND
JOHN J. GLENN,
Solicitors for Complainants.

(Endorsed:) Filed and issued September 4th, 1873. J. L. Dryden. Filed Dec'b. 15th, 1873. Wm. H. Bradley, clk.

(2.)

In the circuit court of Warren County, October term, A. D. 1873.

STATE OF ILLINIOS,
Warren County, ss:

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN MUTUAL LIFE-INSURance Company.
} Bill.

14 And now comes the said defendant, The Northwestern Mutual Life-Insurance Company, by Hoyne, Horton and Hoyne, its solicitors, and enters its appearance in the above-entitled suit.

HOYNE, HORTON AND HOYNE,
Solicitors for Defendant.

In the circuit court of Warren County, October term, A. D. 1873.

STATE OF ILLINOIS,
Warren County, ss:

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN MUTUAL LIFE-INSURance Company. } Bill.

To the honorable Arthur A. Smith, judge of said court:

The petition of The Northwestern Mutual Life-Insurance Company of Milwaukee, in the State of Wisconsin, respectfully shows:

That your petitioner is the defendant in the above-entitled cause, and that the same was brought by the said Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, complainants, on or about the fourth day of September, A. D. 1873, in the circuit court of Warren County, to be held in the county of Warren, and that the said complainants are, and were at the time of bringing this suit, as affiant is informed and believes, citizens of the State of Illinois, and that your petitioner is, and was at the time of bringing this suit, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and located in and a citizen of said State of Wisconsin.

And your petitioner further respectfully shows, upon information and belief, that the said complainants claim in the summons and bill of complaint in this suit, among other things in substance, that upon a final hearing of said cause a decree should be entered requiring said defendant (your petitioner) to pay to said complainants, as such administrators, the sum of five thousand dollars, pursuant to the terms of a contract claimed to have been entered into between said Silas Giddings in his lifetime and your petitioner, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner further respectfully represents that this suit has not yet been tried, but that the same is pending for trial in said circuit court of Warren County, Illinois, and that your petitioner desires to remove this suit, before the trial thereof, into the circuit court of the United States for the northern district of Illinois (being the district wherein said suit is pending), in pursuance of the provisions of law.

And that it is ready and willing to give such good and sufficient security as this court may direct for its doing all acts and things requisite to be done by law upon the removal of a suit into the United States court, and it offers herewith its bond also executed by Oliver H. Horton, of the city of Chicago, Cook County, and State of Illinois, as security in the penal sum of two hundred and fifty dollars, conditioned that your petitioner shall enter in the next term of the circuit court of the United States to be held in the northern district of Illinois, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appropriate acts as by law are required to be done upon the removal of a suit into the United States court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient security according to the provisions of

law, and that the said suit may be removed into the next circuit court of the United States, to be held in the northern district of Illinois, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, &c.

[SEAL.] THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

By JOHN H. VAN DYKE,
President,
And WILLARD MERRILL,
Secretary.

STATE OF WISCONSIN,
Milwaukee County, ss:

John H. Van Dyke, the president of the petitioner in the foregoing petition, being first duly sworn, on oath deposes and says that he is the president of the petitioner in the above petition; that he has read the petition subscribed by him and knows the contents thereof to
18 be true of his own knowledge, except as to those parts thereof which are stated upon information and belief, and as to those he believes the same to be true; and further this deponent saith not.

JOHN H. VAN DYKE.

Subscribed and sworn to before me this (31) thirty-first day of Oct., A. D. 1873.

[SEAL.] FR. BLOODGOOD,
U. S. Commissioner, East. Dist. Wis.

STATE OF ILLINOIS,
County, ss:

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company.
} Bill.

In the circuit court of Warren County, October term, A. D. 1873.

Know all men by these presents that we, the Northwestern Mutual Life Insurance Company as principal, and Oliver H. Horton, of the city of Chicago, Cook County, Illinois, as surety, are held and
19 firmly bound unto Loren Giddings and Leander Giddings, as administrators of the estate of Silas Giddings, deceased, of Warren County, Illinois, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said Loren Giddings and Leander Giddings, as administrators of the estate of Silas Giddings, deceased, as aforesaid, their successors or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated the thirtieth day of October, A. D. 1873.

The condition of the above obligation is such that whereas a suit was brought on or about the fourth day of September, A. D. 1873, in the circuit court of Warren County, by the said Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, as aforesaid, against the Northwestern Mutual Life Insurance Company,

and the same is now pending for trial in said court, and is removable into the circuit court of the United States for the northern district of Illinois;

20 And whereas the said The Northwestern Mutual Life Insurance Company has filed its petition in said circuit court of Warren County for the removal of said suit into the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of the above obligation is such that if the above bounden The Northwestern Mutual Life Insurance Company, or its legal representatives, shall enter or cause to be entered in the circuit court of the United States for the northern district of Illinois, on the first day of its stated session next ensuing, after the order of the said circuit court of Warren County, for the removal of said suit into said circuit court of the United States for the northern district of Illinois, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do or cause to be done such other appropriate acts as by law are required to be done upon the removal of a suit into the United States court, then the above obligations to be void; otherwise to remain of full force and effect.

[SEAL.] THE NORTHWESTERN MUTUAL LIFE INSURANCE COMP'Y,
By JOHN H. VAN DYKE, *President.*
WILLARD MERRILL, *Secretary.* [SEAL.]
OLIVER H. HORTON. [SEAL.]

21 In the circuit court of the county of Warren, October term, A. D. 1873.

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company. } Bill.

It is hereby stipulated by the complainants, with the defendant, that the annexed bond, presented by the said defendant in connection with its petition, to remove the above cause to the United States circuit court for the northern district of Illinois, is satisfactory in form and the security is hereby agreed to be sufficient.

Nov. 21, 1873.

MILLER AND FROST,
Solicitors for Complainants.

(Endorsed:) Filed November 22d, 1873. J. L. Dryden, clerk. Filed Dec'b. 15th, 1873. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 16th day of December, A. D. 1873, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company. } In chancery.

On motion of defendant, by its solicitor, time to answer is extended twenty days.

Afterwards, to wit, on the 3d day of January, A. D. 1874, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE Company. } In chancery.

On motion, time is extended ten days for the defendant to answer the bill of complaint herein.

23 Afterwards, to wit, on the 13th day of January, A. D. 1874, said defendant, by its solicitors, filed in said clerk's office its answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the northern district of Illinois. Northern district of Illinois, ss.

LOREN GIDDINGS, ADMINISTRATOR, ET AL.
vs.
NORTHWESTERN MUTUAL LIFE INSURANCE Company of Milwaukee. } In chancery.

The answer of the Northwestern Mutual Life Insurance Company of Milwaukee, in the State of Wisconsin, defendant, to the bill of complaint of Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, of Warren County, in the State of Illinois, complainants:

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said complainants' said bill of complaint contained, for answer
24 thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant answering, says it hath no knowledge as to the death of said Silas Giddings, nor as to whether or not said complainants are administrators of his estate; therefore leaves the complainants to the proof thereof.

This defendant, further answering, denies that said Roberts and Hubbard were the local agents of this defendant, empowered to take appliations for life insurance and for loans of money or generally to attend to the insurance and loaning business of this defendant in said county of Warren as is in said bill of complaint alleged.

This defendant, further answering, denies that said Silas Giddings, in his lifetime, ever applied to this defendant, either directly or through any authorized agent or agents of this defendant, for a policy upon the life of said Silas Giddings for the sum of five thousand dollars ($5,000) or for a loan of said sum from this defendant.

This defendant, further answering, says and avers the fact to be that one Silas Giddings, by his certain application in writing bearing date on or about the 30th day of July, 1872, applied to this defendant for

25 insurance upon his life in the sum of six thousand dollars ($6,000), and also by his certain application made at the same time, and of even date with the said application for insurance, applied to this company for a loan of the sum of six thousand dollars ($6,000), to be secured upon certain real estate in said application for a loan mentioned and described; that said applications were together or at or about the same time forwarded to this defendant at Milwaukee, Wisconsin, by its life insurance agents, Messrs. Dean and Payne, of Chicago, in said district; and this defendant, upon information and belief, denies that it was agreed by and between said Silas Giddings and any agent or agents of this defendant, that the premium to be paid upon such life insurance policy, if the application therefor was accepted by this defendant, should be deducted from any money loaned or to be loaned by this defendant to said Silas Giddings, and expressly denies that any agent or agents of this defendant had any right or authority whatever to make any such agreement with said Giddings or any other person or persons.

This defendant, further answering, says and avers the facts to be that said application for insurance was for a policy in said company
26 upon the "non-participating plan," the annual cash premium upon which, payable in advance, was the sum of three hundred and two dollars and fifty-two cents ($302.52). That said application for insurance was passed upon and accepted by this defendant on or about the twenty-fourth day of August, A. D. 1872, a policy therefor to be issued by this defendant.

That this defendant caused such policy to be prepared and forwarded to said Dean and Payne; that it is expressly provided in all policies issued by the defendant, and in said policy, as follows, among other things, to wit: "This policy shall not take effect and become binding on the company until the premium shall be actually paid during the lifetime of the person whose life is assured, to the company or to some person authorised to receive it, who shall countersign the policy on receipt of the premium." That said premium was never paid, or tendered or offered to be paid, by said Silas Giddings, in his lifetime, to this defendant, or to any person or persons authorised to receive the same; that said policy was never countersigned, and such policy was never issued or delivered by this defendant, and was never in force as against this defendant.

27 This defendant, further answering, says and avers the truth to be that said application for a loan of the sum of six thousand dollars ($6,000) was never accepted by this defendant; that this defendant, by the action of the executive committee, duly authorised and empowered by this defendant to act in that behalf did on the fourth day of September, A. D. 1872, decline to accept said application for a loan of six thousand dollars ($6,000) to said Silas Giddings, but on the night of the day last aforesaid proposed and decided to offer to said Silas Giddings a loan of the sum of five thousand dollars ($5,000) upon the security in said application described, notice of which was duly forwarded to the address of said Silas Giddings, but the same was never accepted, approved, or agreed to by or on behalf of said Silas Giddings at any time; that this defendant, upon information and belief, says said Silas Giddings did not desire or propose or agree to accept said policy of insurance and pay the premium thereon unless the loan from this defendant to him for said sum of six thousand dollars ($6,000) was made and perfected in pursuance of his said application therefor.

This defendant, further answering, denies that said application
28 for life insurance was duly accepted by said Dean and Payne,

general agents for this defendant for said State of Illinois, and avers the truth to be that neither said Dean and Paine, or any other agent or agents of this defendant, has or ever had any authority to accept an application for life insurance otherwise than to receive and forward the same to this defendant for acceptance by this defendant.

This defendant, further answering, denies that in the latter part of August, A. D. 1872, or the fore part of September following, and prior to the fourth of September, 1872, or prior to the death of said Silas Giddings, that this defendant formally acted upon both of said applications, and accepted each of them, and directed the issuing of said policy to said Silas Giddings and the granting and consummation of the said loan to him, each of the sum and to the extent of five thousand dollars ($5,000) as charged and averred in said bill of complaint, and denies that this defendant directed and ordered the necessary papers for said insurance and said loan to be prepared and forwarded to said Silas Giddings, and denies that prior to the death of said Silas Giddings a due and valid contract for insurance in the sum of five thousand dollars ($5,000), or in any other sum whatever,
29 was duly made between said Silas Giddings and this defendant, and denies that a valid contract between said parties was ever made for a loan by this defendant to said Silas Giddings for a sum of five thousand dollars ($5,000), and denies that there was any contract that any such loan was to be secured by such policy of insurance.

This defendant, further answering, denies that said Silas Giddings was ready and willing to fulfil, carry out, and consummate in all respects any contract or contracts for insurance or for a loan entered into between him and this defendant, because no such contract or contracts was or were ever made or entered into; and denies that any administrators of said Silas Giddings since his death have also stood ready, able, and willing, or have offered and tendered full performance of any such contract or contracts as is in said bill of complaint alleged.

This defendant, further answering, says that it has no knowledge as to the death of said Silas Giddings; that it is informed and believes and charges the truth to be that its agents, said Dean and Payne, were authorized and prepared to countersign and deliver to him, said
30 Silas Giddings, the policy of insurance from this defendant upon the life of said Silas Giddings, provided and upon the condition that he, said Silas Giddings, would accept the same and pay the premium thereon, in pursuance of the terms of his said application for insurance, but that said Silas Giddings never did so; but this defendant is informed that after the fourth day of September, A. D. 1872, and after the time when it is stated in said bill of complaint said Silas Giddings died, some person or persons applied to said Dean and Payne stating that said Silas Giddings was deceased, and offering at the same time to pay the said Dean and Payne money (but what amount this defendant does not know), and at the same time claiming and insisting that said Dean and Payne should countersign, issue, and deliver to such person or persons a policy of life insurance upon the life of a man, to wit, said Silas Giddings, whom such person or persons then admitted was dead.

This defendant, further answering, says and avers the truth to be that this defendant is what is usually termed a "Mutual Life Insurance Company"; that each of the persons named therein is a member thereof; that neither the agents or officers of this defendant had any right or authority to accept the premium, countersign and issue a
31 policy upon the life of a person then already deceased, and that such action would have been, under the charter, rules, and regula-

tions of this defendant, and under the terms of said application for insurance, and the provisions of the policies issued by this defendant, a fraud upon the other members of said company, and wholly illegal and void; and this defendant denies that said Silas Giddings, or any person or persons representing him or authorized so to do, has or have ever accepted said proposition of this defendant to loan to said Silas Giddings said sum of five thousand dollars ($5,000), or ever offered or tendered compliance with the terms of the application for any loan by said Silas Giddings from this defendant.

This defendant, further answering, says and avers the truth to be that no proof or evidence of the death of said Silas Giddings has ever been furnished or made to this defendant in compliance with or as required by the terms and provisions of all policies of insurance issued by this defendant; and that this defendant has never had any opportunity of investigating as to such death, or as to any liability of this defendant, and therefore respectfully insists that in no event could this hon-
32 orable court order or decree the payment of any sum of money by this defendant as insurance money upon the life of said Silas Giddings.

This defendant, further answering, saith that the only entry upon the record of this defendant in regard to the matters enquired of in said bill of complaint is that of the action of the executive committee in rejecting the application of said Silas Giddings for a loan of the sum of six thousand ($6,000) dollars and voting a proposal of loan to him of the sum of five thousand dollars upon the security of the premises in said application for a loan mentioned, at which meeting the executive committee convened at seven o'clock in the evening of the fourth day of September, A. D. 1872, and after disposing of a number of other loan-applications the record shows the action of the committee on said loan-application as follows, to wit, "5,000 for 5 y'rs at 10% to Silas Giddings, sen'r, on 154 acres in Warren County, Ill., described in his application, dated July 30th, 1872, and on file in this office," notice of which action of the committee was on the 5th day of September, 1872, mailed to Dean and Payne, of Chicago, Ill's, stating that the following loans were voted at the meeting of the executive committee held the previ-
33 ous evening, reference being made to that of Silas Giddings, sen'r, in the words and figures following, to wit, "$5,000 to Silas Giddings, s'r, Warren Co., Ill., who applied for $6,000."

The record entries as to the said policy of insurance are as follows:

24	Giddings, Silas, sr., farmer, self.	Do.	Do. Do. Do. Do. 8 Nov., 1816.	56	68909	Non-p't'g L., 6,000.	A	302 52	302 52	R	C'd Oct., 1872. N. T.

Which entries signify as follows: The figures "24," 24th day of August, 1872; "Silas Giddings, sr., farmer, self," the name of the applicant occupation, and the beneficiary; the first "do," residence, previously named under a prior entry under another policy; the words "do" in the next column, names of the agency and agents, also similar to those in the preceding application; the words "8 Nov., 1816," the date of birth of the applicant for insurance as shown in his application; "56" his age; "68909" the No. of the policy applied for; the words "non-p't'ng L," the character of the policy applied for to be non-participating, life; "6,000" the amount of the policy applied for; the letter "A" shows

that the payment of premium is to be made annually in advance; the figures "302.52" the amount of each payment to be made; and the second entry of the same figures the total amount of the
34 annual premium to be paid in order to put the policy in force and to continue it; the letter "R" that the policy has been received back from the agents; the letters "C'd Oct. 1872, N. T," cancelled October, 1872, not taken or put in force.

And this defendant denies all and all manner of unlawful actions or doings wherewith it is by the said bill charged; without this that there is any other matter, cause, or thing in said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied as true to the knowledge or belief of this defendant, all which things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

[SEAL.] THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
By JOHN H. VAN DYKE,
President,
AND WILLARD MERRILL,
Secretary.

EASTERN DISTRICT OF WISCONSIN,
County of Milwaukee, ss:

35 John H. Van Dyke, of the city of Milwaukee, in said county, being first duly sworn, deposes and says that he is the president of The Northwestern Mutual Life Insurance Company of Milwaukee, and is familiar with its affairs and has access to the records of said defendant; that he has read the foregoing answer of said defendant and knows the contents thereof, and that the same, so far as stated upon the knowledge of this deponent, is true; and that as to all other matters therein stated he verily believes the same to be true.

JOHN H. VAN DYKE.

Subscribed and sworn to before me, this 10 day of Jan'y, A. D. 1874.

Witness my hand and official seal at Milwaukee aforesaid, this 10 day of Jan'y, 1874.

[SEAL.] F. W. BLOODGOOD,
U. S. Comm'r E. Dist. of Wisconsin.

(Endorsed;) Rec'd Jan'y 13, 1874. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 17th day of March, A. D. 1874, said complainant, by their solicitors, filed in said clerk's office their
36 replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, northern district of Illinois. In chancery.

JOHN GIDDINGS ET AL., ADMINISTRATORS, &C.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company, of Milwaukee, Wisconsin.

The replication of the said complainants to the answer of the Northwestern Mutual Life Insurance Company, defendant.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed
37 and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

MILLER AND FROST,
AND J. J. GLENN,
Solicitors for Complainants.

(Endorsed:) Filed Mar. 17, 1874. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 13th day of April, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIEE INSURance Company. } In chancery.

Now come the parties by their solicitors, and on motion of complainants' solicitor it is ordered by the court that the defendant close its proofs herein within sixty days.

Afterwards, to wit, on the 27th day of May, A. D. 1876, in the
38 record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company.

On motion of defendant's solicitor, it is ordered by the court that

Francis Bloodgood, esq., of Milwaukee, Wisconsin, be and he is hereby appointed a special examiner, under the amended sixty-seventh rule in equity of the Supreme Court of the United States, to take proofs herein and report the same to the court.

Afterwards, to wit, on the 13th day of June, A. D. 1876, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE Company. } In chancery.

Now come the parties by their solicitors, and on motion of complainants' solicitor time is extended fifteen days to take rebutting evidence herein.

39 And on further motion of complainants' solicitor, it is ordered by the court that Henry B. Mason, of Chicago, be and he hereby is appointed special examiner, to take proofs herein and report the some to the court. To which orders defendant by its solicitor excepts.

Afterwards, to wit, on the 29th day of June, A. D. 1876, said parties, by their solicitors, filed in said clerk's office their stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

LOREN GIDDINGS ET AL., ADMINISTRATOR, &c.,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE Company, of Milwaukee, Wisconsin.

It is hereby stipulated that the bill of complaint filed in the above entitled cause may be amended by inserting the words "six thousand dollars" in place of the words "five thousand dollars," wherever the same occur, as a statement of the amount of the insurance therein mentioned.

MILLER AND FROST,
Compl'ts' Sol'rs.

40 HOYNE, HORTON & HOYNE,
Sol'rs for Def't Ins. Co.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE Company.

And now come the complainants by Miller and Frost, their solicitors,

and move the court for leave to amend their bill of complaint herein as follows:

1st. In the last line on page 2 of bill and 1st line of page 3 insert the figures and words "30th day of July" in place of figures and words "19th day of August."

2nd. After the word "also," in line 8, page 3, insert the words "an application."

3rd. In the place of the words "19th of August," in line 17, page 3, insert the words "30th of July."

4th. In the place of the word "agreed," in line 26, page 3, insert the word "arranged."

5th. In the place of the figures "19th," in line 26, page 4, insert the figure "6th."

MILLER & FROST,
Comp'ts' Sol'rs.

The above amendments may be made without application to
41 the court upon the express agreement between the parties to said cause that the amending of said bill shall have no effect upon any question as to competency or admissibility of testimony or depositions in said cause, or the time of taking or filing the same, or of the reading of the same upon the hearing of said cause.

Chicago, June 20th, 1876.

HOYNE, HORTON AND HOYNE,
Def'ts' sol'rs.

MILLER AND FROST,
Compl'ts' sol'rs.

(Endorsed:) Filed June 29, 1876. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 29th day of June, A. D. 1876, said complainants by their solicitors filed in said clerk's office their amended bill of complaint in said entitled cause, which said amended bill is in the words and figures following, to wit:

Amended bill of complaint.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States.

To the honorable judges of the circuit court of the United States for the northern district of Illinois.

Humbly complaining, showeth unto your honors, your orators
42 Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, of Warren County, in the State of Illinois: That in the months of August and September, A. D. 1872, one Payton Roberts and Hubbard, doing business under the name and style of Roberts and Hubbard, were the local agents of the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, a corporation organized under and by virtue of the laws of the State of Wisconsin, but carrying on the life insurance business also in the State of Illinois.

That said Roberts and Hubbard were the duly authorized agents of said company, an incorporation, in the county of Warren and State of

Illinois, and were by said corporation duly empowered to take applications for life insurance, and also for loans of money, in which said corporation was also engaged and generally to attend to the insurance and loaning business of said company in the limits of the county of Warren.

That while said agents were so acting in said capacity for said corporation, and while said corporation was duly prosecuting its life insurance and loaning business in the State of Illinois and in the county of
43 Warren, application was made to said Roberts and Hubbard, on or about the 30th day of August, 1872, and through them as such agents to said Northwestern Mutual Life Insurance Company, for a policy upon the life of said Silas Giddings, by said Silas Giddings during his life-time, for the sum of $6,000, and also an application for a loan of five thousand dollars ($5,000) from said company to said Giddings, the amount of insurance to be secured by the life policy to said Silas Giddings, to be the sum of six thousand dollars ($6,000).

Your orators further state that on or about the 30th of July, 1872, the application for said life insurance by said Silas Giddings, made in due form as required by the regulations and rules of said company and subscribed by him, was furnished to said agents, said Roberts and Hubbard, and it was then and there arranged by and between said company through said agents and said Giddings that in case said several applications for life insurance and for said loan should be accepted by the company, that the premium to be paid for the policy should be deducted from the money loaned and the balance paid to said Silas Giddings, and agreeably to the rules and customs of said company,
44 said applications were by said local agents, at the request of said Silas Giddings, presented to the general agents of said company, J. E. Dean and Oscar Payne, doing business under the firm name of Dean and Payne for said corporation, and being the general agents of said corporation for the State of Illinois, their office being located in the city of Chicago, in said State. That said application for life insurance was duly received and accepted by said general agents, said Dean and Payne, on the 6th of August, and both the application for said life insurance policy and for said loan of five thousand dollars, after having been duly received by said Dean and Payne from said local agents in Warren County, were by said Dean and Payne duly forwarded to the general home office of said corporation in the city of Milwaukee and State of Wisconsin, where the general business of said company was carried on.

And your orators further show unto your honor, that afterwards, in the latter part of August, 1872, or the fore part of September following, and prior to the fourth day of September, 1872, and prior to the death of said Silas Giddings, but the precise date your orators are un-
45 able to state with accuracy, the said Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, having duly received at said home office said applications respectively for life insurance upon the life of said Silas Giddings in the sum of six thousand dollars and for a loan to said Giddings in the sum of five thousand dollars, formally acted upon both of said applications and duly accepted each of them respectively and directed the issuing of said policy to said Silas Giddings and the granting and consummation of said loan to him in the sum and to the extent of five thousand dollars, and advised their general agents, said Dean and Payne, thereof, and sent notice of acceptance of said applications through their said agents to said Giddings to be by them and by said Roberts and Hubbard, said local agents in Warren county, communicated to said Giddings, and directed and or-

dered the necessary papers to be prepared and forwarded to said Giddings; and so your orators charge that prior to the death of said Silas Giddings a due and valid contract for insurance in the sum of six thousand dollars was duly made between said Silas Giddings and said insurance company and corporation aforesaid, as well as also between
46 said parties a valid contract for a loan of five thousand dollars, being the same sum which was to be secured by the life policy aforesaid agreed to be delivered to said Silas Giddings by said company.

And your orators further state that during all of said time said Silas Giddings was ready and willing to fulfil, carry out and consummate in all respects the contracts aforesaid entered into between him and said company; that he was able, ready, and willing, and his administrators since his death have also stood ready, able and willing, and offered and tendered full performance on their part, by tender and offer of the premium and necessary securities required upon said loan, to fulfil each of said contracts on their part.

Your orators further state, that on the fourth day of September, A. D. 1872, said Silas Giddings died, and that said corporation and insurance company did not, prior to his death, nor have they since, ever offered or tendered any policy of insurance in conformity with said contract so made between said company and said Giddings, nor have they loaned or offered to loan the money aforesaid so agreed to be
47 loaned, but have wholly and emphatically refused to carry into effect said contracts, or either of them, and have refused to accept the premium upon said policy, although tendered to them by said administrators of said Silas Giddings, and have wholly repudiated said contracts, and each of them, and all obligation, legal or equitable, to deliver said policy, and denied, utterly, the existence of any valid or binding contract between said Silas Giddings and said company, and denied any duty on their part either to issue said policy or to pay the six thousand dollars to be secured thereby, although as your orators charge said company was duly bound to issue said policy and to pay said six thousand dollars to the executors of the estate of said Silas Giddings.

Your orators therefore pray, inasmuch as they have no adequate remedy at law, the interposition of this court as a court of equity, that a summons in chancery issue against said Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, said corporation, returnable at the next term of this court, to answer the complaint of your orators, and that said corporation by its president and general officers under their corporate seal may be compelled to answer under oath this
48 your orator's bill and to state specifically under oath precisely what action was had and taken by said company upon said application for said policy and upon said application for said loan, and the exact date thereof, and to give an exact copy from the books and records of said corporation of said action and of all that appears upon said books and records pertaining to said policy and said loan and the several applications therefor, together with the date of each entry and copy from said books and records. And your orators further pray, that upon a final hearing of this cause a decree may be made directing and requiring said corporation to issue the policy upon the life of said Silas Giddings aforesaid in the sum of six thousand dollars to your orators as the administrators of his estate, and that a further decree may be made requiring said corporation to pay to your orators as such administrators the sum of six thousand dollars, pursuant to the terms of said contract, under the

provisions of said policy to which said Silas Giddings by the provisions of the contract was entitled.

And your orators further pray that such other and further relief may be granted as to your honor may seem meet, and that the defend-
49 ant may be required to pay the costs of this suit, and your orators as in duty bound will ever pray.

MILLER AND FROST,
AND J. J. GLENN,
Solicitors for Complainants.

(Endorsed:) Filed June 29, 1876. Wm. H. Bradley, cl'k.

Afterwards, to wit; on the 9th day of October, A. D. 1876, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit.

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL Life Insurance Company. } In chancery.

On motion of complainants' solicitors, it is ordered that this cause be set down for hearing upon the bill, answers, pleadings, and proofs on file herein.

Afterwards, to wit, on the 6th day of March, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry to wit:

LOREN GIDDINGS ET AL.
vs.
50 THE NORTHWESTERN MUTUAL Life Insurance Company. } In chancery.

On motion of Mr. Miller, solicitor, it is ordered that this cause be set down for hearing upon pleadings and proofs herein, said hearing to be had on Monday next.

Afterwards, to wit, on the 12th day of March, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry to wit:

LOREN GIDDINGS ET AL.
vs.
NORTHWESTERN MUTUAL LIFE Insurance Company. } In chancery.

Now come the parties by their solicitors, and defendant by its solicitor moves the court to set his cause down for hearing upon the bill and answer and replication, which motion the court overrules, and defendant excepts to said ruling.

And thereupon it is ordered by the court that this cause be set down for hearing upon the pleadings and proofs herein and after hearing the same in part the further hearing of the cause is postponed until to-morrow.

51 Afterwards, to wit, on the 13th day of March, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry to wit:

LOREN GIDDINGS ET AL.
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY. } In chancery.

Now come again the parties by their solicitors, and after hearing the concluding arguments of counsel, the court, not being now sufficiently advised, takes the same under advisement.

Afterwards, to wit, on the 12th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry to wit:

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN LIFE INSURANCE COMPANY of Milwaukee. } In chancery.

Now come the parties by their solicitors, and the court, having
52 considered and being now fully advised upon the matters heretofore submitted herein, finds the equities herein with the defendant, and dismisses the bill of complaint herein at the costs of the complainant.

It is thereupon considered, adjudged, and decreed by the court that this cause be dismissed and that the defendant do have and recover of the complainants its costs and charges about its defence in this behalf expended, amounting to the sum of one hundred and seventeen dollars and fifty cents, and that execution issue therefor.

And thereupon said complainants pray an appeal to the Supreme Court of the United States, which is allowed by the court upon giving bond herein in the sum of five hundred dollars, with security to be approved by the court.

On the same day, to wit, the 12th day of April, A. D. 1877, a certificate of evidence was filed in said clerk's office in said entitled cause, which said certificate is in the words and figures following, to wit:

Certificate of evidence.

Northern district of Illinois, circuit court.

LOREN GIDDINGS ET AL.
vs.
NORTHWESTERN LIFE INSURANCE COMPANY. } In chancery.

53 Be it remembered that on the hearing of the above entitled cause the following testimony was read in support of the issues, to wit:

Two depositions of Peyton Roberts.

Deposition of John J. Glenn.
Deposition of Oscar Payne.
Deposition of Truman H. Day.
Deposition of William Merrill and exhibits therein referred to, including policy of insurance made out by def't to Silas Giddings, sr.
Deposition of W. H. Farnham.
Deposition of J. M. Ponchet.
Deposition of G. W. Young.
Letters of administration issued by co. court of Warren Co., Ills., to comp'ts as adminis' of Silas Giddings, sr.
Witness my hand this 12th day of April, 1877.

H. W. BLODGETT, *Judge.*

(Endorsed :) Filed April 12, 1877. Wm. H. Bradley, cl'k.

54 *Deposition of Peyton Roberts.*

Deposition of Peyton Roberts, taken before Henry B. Mason, notary public, at Chicago, Cook County, Illinois, on January 26, 1876.

Int. 1. Where do you reside?
Ans. Monmouth, Warren County, Illinois.
Int. 2. What is your age and occupation?
Ans. My age is 37 and my occupation an insurance agent.
Int. 3. Are you acquainted with Loring Giddings and Leander Giddings, the plaintiffs, administrators of the estate of Silas Giddings?
Ans. I am.
Int. 4. Were you acquainted with Silas Giddings during his lifetime?
Ans. I was.
Int. 5. Is he still living?
Ans. No, sir.
Int. 6. When did he die?
Ans. September 4th, 1872.
Int. 7. Were you at any time agent of the Northwestern Mutual Life Insurance Company, of Milwaukee, Wisconsin, the defendant?
(Question objected to by defendant's attorney.)
Ans. I was.
Int. 8. What time did your agency commence?
Ans. July 25th, 1872.

55 Int. 9. Do you know whether or not this insurance company, the defendant in this case, had any general agents in this State of Illinois? And if yea, state who they were and where located?

Ans. They had. It was Dean and Payne, Chicago. Their office was here in Chicago.
Int. 10. State whether you carried on correspondence with Dean and Payne by letter, and how extensively, in the course of your business as agent for the company.
Ans. I carried on correspondence with them during the months of July, August and September, of the year 1872.
Int. 11. Will you look at that letter and say whether you received it from Dean and Payne, and if so, at what time?
Ans. My partner received this letter; my partner is Mr. B. T. O. Hubbard; he received that letter and it is addressed to him; he received it on or about the 26th day of July, 1872.

NOTE.—This letter put in evidence and marked Exhibit A.

(The foregoing question and the introduction of letter objected to by defendant's attorney.)

Int. 12. What was the nature of your agency for this insurance company, and what did you do while acting for them, and what relation did you have, if any, with Mr. B. T. O. Hubbard in reference to the business done for the company?

56 Ans. Effecting life insurance and loaning money for said company. I effected quite a number of applications for insurance, and also for loans. Mr. Hubbard and I were acting as partners in reference to this business and also in other business.

Int. 13. When you effected applications for life insurance, as you say, after the applications were signed or made out in due form, what was done with them by you?

(Question objected to by defendant's attorney.)

Ans. I mailed some of them to this city to the general agents of the company, Dean and Payne. I sent some of them by express to the same parties, and delivered others in person to the same.

Int. 14. State whether at any time you took the application of Silas Giddings for the insurance upon his life, and, if yea, for what amount and in what company?

Ans. I did. $6,000.00. Northwestern Mutual Life, of Milwaukee, the defendant.

Int. 15. When was this?

Ans. July 30th, 1872.

Int. 16. State what was done with the application.

Ans. I delievered it to Messrs. Dean and Payne, general agents of the company, in person, in August of the same year.

Int. 17. State whether or not the application was signed, and, if yea, by whom.

57 Ans. It was signed by Silas Giddings, senior; the one of whom I spoke before.

Int. 18. Is he the man upon whose life the policy was sought?

Ans. Yes, sir.

Int. 19. State whether it was signed by any other person besides Giddings, or whether any other person's name was upon the back of the application, and, if so, whose.

Ans. It was signed by another person. It was signed on the back by one of the medical examiners of the company, Doctor William Walker, also Roberts and Hubbard, as agents.

Int. 20. If there was any other person whose name was anywhere upon the application, please state who it was.

Ans. I don't know of any other signatures.

Int. 21. Please state what you did with this application.

Ans. I delivered it to Messrs. Dean and Payne, general agents of the company, in person.

Int. 22. Where and when did you so deliver it?

Ans. In Chicago, about the 6th of August, 1872.

Int. 23. Was the application ever returned to you, or what became of it?

58 Ans. It was not returned to me. The general agents said it was a good application, and they would forward it for a policy at once.

Int. 24. Have you ever seen it since?

Ans. No, sir.

Int. 25. Will you look at that paper, and say whether that is the blank form of application which you used in Giddings' case and which he signed?

Ans. The form is similar to the one I used.

(This form put in evidence, and marked Exhibit B.)

Int. 26. Was there at any time any application for a loan made through you to this life insurance company by Silas Giddings, and, if yea, when and for what sum was the application made?

Ans. There was, on the 30th of July, 1872, for $6,000.00.

Int. 27. Where was it that these two applications of which you have spoken were made, and what was your residence, and the residence of Silas Giddings, at the time they were made?

Ans. They were made at my office in Monmouth, Warren County, Illinois. My residence was Monmouth, Warren County, Illinois. Silas Giddings' residence was near Cameron, Warren County, Illinois.

Int. 28. What was said, if anything, by Silas Giddings to you in reference to this loan and with regard to the amount of it?

(Question objected to by defendant's attorney.)

59 Ans. He asked for a loan of $6,000.00. I told him I thought $5,000.00 was as much as the company would care to loan on the security. He then asked me to make the application for $6,000.00, and that if the company wouldn't grant but five thousand the same would be satisfactory to him.

Int. 29. What further was done, if anything, in reference to Giddings' application for a loan, by you?

Ans. I delivered it to Messrs. Dean and Payne, general agents, with the life application.

Int. 30. Was there any conversation between you and Giddings at the time you received these applications, in reference to the payment of the premium on the policy of life insurance for which he applied? And if yea, state what was said on the subject.

(Question objected to by defendant's attorney.)

Ans. There was. He asked me when he should be required to pay the premium on the policy. I told him he could settle the same when the policy and the amount of the loan should be delivered. I told him he could pay it out of the money received.

Int. 31. What conversation, if any, did you have with Dean and

60 Payne, at the time these applications were delivered by you to them, touching the matter.

(Question objected to by defendant's attorney.)

Ans. I told them that I had arranged with Mr. Giddings about paying the premium at the time of the delivery of the policy and the amount of the loan.

Int. 32. What did you say the arrangement was between you and Giddings?

(Question objected to by defendant's attorney.)

Ans. That he should pay the premium at the time of the delivery of the policy and the amount of the loan out of the money loaned.

Int. 33. What did Dean and Payne say in reply, if anything?

(Objected to by defendant's attorney.)

Ans. They said the same was satisfactory to them.

Int. 34. Did they say anything as to what the practice of the company was in such cases?

(Objected to by defendant's attorney.)

Ans. They did.

Int. 35. What did they say?

(Objected to by defendant's attorney.)

Ans. Said it was customary to collect the premiums at the delivery of the policies.

Int. 36. Did they say in what way it was customary to collect the

premium in cases where an application for a loan was made, as
61 well as an application for a life insurance, and if yea, what did they say?

(Objected to by defendant's attorney.)

Ans. They did. They said the company would send a draft payable to Mr. Giddings' order for the full amount of the loan, and that I should collect the premium out of him or any other parties with whom I dealt at time of delivering policies and drafts for loans.

Int. 37. What was said by Dean and Payne, if anything, in reference to this application for a loan, and what was to be done with it in this case of the application of Giddings?

(Objected to by defendant's attorney.)

Ans. They said they would forward it to the company at once.

Int. 38. Look at this paper marked Exhibit C, and say whether you received it, and how, and when.

Ans. I received it from telegraph operator on the 6th of September, 1872.

(Paper put in evidence, marked Exhibit C.)

Int. 39. State whether you received after this any other communication from Dean and Payne, general agents of the defendants, in reference to these applications of Giddings, and if so, when, and what was it?

Ans. I did; on or about the 8th day of September, 1872, I received a letter, which I hold in my hand, marked Exhibit D.

(Letter marked Exhibit D put in evidence.)

62 Int. 40. State whether you received the policy that was applied for by Giddings from the company or their agents.

Ans. I did not.

Int. 41. State whether you received from the company or their agents the amount of this loan by draft or otherwise.

Ans. I did not.

Int. 42. What was your custom and the custom of the company relative to the policies after an application had been sent to the company and acted upon and accepted by the company?

(Question objected to by defendant's attorney.)

Ans. The general custom is for the company to forward the policy through the general agent to the local agent for delivery of policy and collecting of premium.

Int. 43. Was anything stated to you by Dean and Payne, the general agents, at the time of the delivery of the application, as to how the loaned money would be sent, and to whom it would be sent, and if so, what was said by them on this subject?

(Question objected to by defendant's attorney.)

Ans. There was. They said the company's draft would be sent to me for the full amount of the loan, payable to the order of Mr. Giddings.

Int. 44. Was anything done by any person aside from the com-
63 pany and its agents, with reference to this policy, or the payment or tender of the premium, and if yea, when and by whom, and what was done in the premises?

(Question objected to by defendant's attorney.)

Ans. There was. It was some time during the month of September, 1872, by John J. Glenn, attorney for the estate of Silas Giddings. He laid on my table a thousand dollars and asked me to take out of it the amount of the premium on the life policy of Silas Giddings.

Int. 45. Did you take it out?

Ans. I did not.

Int. 46. When you presented to Dean and Payne the application for the loan, did you say anything to them in respect to the amount of the loan, and what Giddings had said to you on that subject? If so, will you state what you said to them on that subject?

(Question objected to by defendant's attorney.)

Ans. I did. I told them that Mr. Giddings' application for loan asked for more than a one-third value of the security, the value being between $17,000.00 and $18,000.00, and that I told Mr. Giddings that I did not think the company would grant a $6,000.00 loan in his case. I also told them that I said to Mr. Giddings that I thought $5,000.00 would be all the company would care to loan on the security, and
64 that he had said that the same would be satisfactory to him in the event of the company's objecting to loaning more.

Int. 47. With which member of the firm of Payne and Dean was this conversation had?

Ans. Mr. Payne.

Int. 48. Was anything said between yourself and Mr. Giddings as to reducing the amount for which the policy should issue, in the event of less than $6,000.00 should be loaned to him.

(Objected to by defendant's attorney.)

Ans. There was not.

Int. 49. Were the blanks already put in evidence to be signed by the applicant, and the endorsement upon the back of it to be signed by the medical examiner, fully and properly filled out, and the questions answered?

(Objected to by defendant's attorney.)

Ans. It was, and they were.

Int. 50. Have you seen this paper since you delivered it to the general agents in Chicago?

Ans. I have not.

Int. 51. Give a general description, so far as you can, of the paper you gave to these agents, containing the application of Giddings for a loan, and how you came to know the manner in which such an application should be made.

Ans. The application calls for the name, residence, the num-
65 bers of the lands offered as security, and as to the title of same. It also enquires as to indebtedness and judgments of the applicant and his credit in the community in which he lives. I knew the manner in which such an application should be made by the company's printed instructions.

Int. 52. State whether the agents of the company furnished you with and blank applications of this character to be filled out by the applicant and signed by him.

Ans. They did.

Int. 53. Was that so done in this case that it was the company's blank filled out and signed by Giddings in this case?

Ans. It was.

Int. 54. Have you ever seen this application since you delivered it to the agents here in Chicago?

Ans. I have not.

Int. 55. State whether any other paper was sent to the company or their general agents and accompanied this application for a loan. And if yea, what was it?

Ans. There was an abstract of title of the land offered as security by Mr. Giddings for this loan.

Int. 56. Was there any certificate of appraisal of the value of the land accompanying the application? And if so, describe it and state what it contained, as far as you can.

66 (Question objected to by defendant's attorney.)

Ans. There was; it was a certificate of two or more freeholders residing contiguous to Mr. Giddings' land, containing their opinion of the value of same. It contained the value as set forth by those parties between $17,000.00 and $18,000.00. I don't remember the precise figures.

PEYTON ROBERTS.

EXHIBIT A.

[Agency of the Northwestern Mutual Life Insurance Co. of Milwaukee, Wis.]

CHICAGO, *July 25th*, 1872.

B. T. O. HUBBARD, Esq.,
Monmouth, Ills.:

D'R SIR: Your esteemed favor of July 24th at hand and noted. We herewith hand you loan-blanks, and also send you to-day by express insurance blanks of which you will have need; our terms you have in letter of July 19th.

You will observe appraisal blank attached to loan-blank. As far as you are able please make your own appraisals, having one other party join with you; when you are unable to make your own appraisals please employ two gentlemen of integrity and sound judgment to make them. In these cases you should send letter recommending the

67 appraisers as men of that character. Please write as your Chicago correspondents. Hoping you will be able to do a good business, we remain,

Respectfully,

DEAN AND PAYNE.

68 EXHIBIT C.

The Western Union Telegraph Company. Dated Chicago, Sept. 6, 1872.

To ROBERTS and HUBBARD:

Francis Smith and Rockwell loans voted in full.
Geddings five thousand.

DEAN AND PAYNE.

EXHIBIT D.

[Agency of the Northwestern Mutual Life Insurance Co. of Milwaukee, Wis.]

CHICAGO, *Sept. 7th*, 1872.

ROBERTS and HUBBARD,
Monmouth:

GENTS: At the last meeting of the exec'e committee the following loans were granted:

$5,000 to Silas Giddings, Warren Co., who applied for $6,000.
$3,000 " Albert J. Rockwell, " $3,000.
$2,000 " Phineas P. Smith, " $2,000.

$3,000 " Henry Francis, Henderson Co., " $3,000.

Oblige us by having the necessary papers prepared and forwarded at applicant's expense.

The money is ready as soon as papers are.

Respectfully,

DEAN AND PAYNE.

69 Testimony of PEYTON ROBERTS, taken before Henry B. Mason, notary public, at the city of Chicago, county of Cook, and State of Illinois, on March 3, 1876.

Direct examination continued:

Int. 57. Before the application for the life policy was submitted by Mr. Giddings, was anything said between you upon the subject as to what the annual premium would be?

(Question objected to by defendant's solicitor for the reason that the application is in writing and speaks for itself, and for the further reason that the verbal statement of conversations between the witness and deceased is incompetent.)

Ans. There was.

Int. 58. What was said?

(Defendant's solicitor repeats same objection as to former question.)

Ans. What was said was in substance about three hundred dollars premium. He was informed as to what the premium would be.

PEYTON ROBERTS.

Solicitors for defendant, by consent and agreement of solicitors for complainants, here object to certain of the direct interrogatories and answers thereto, as follows:

70 OBJECTIONS.—To the 7th, 8th, and 12th, for the reason it is not shown that the agency referred to or claimed was by verbal agreement and not in writing.

To the 28th, 46th, 49th and 51st, for the reason that the application was in writing and speaks for itself, and also that the parol statements of Silas Giddings and those of the witness then made are incompetent.

To the 30th and 32nd, for the reason above sated as to the 28th interrogatory, and for the further reason that there is no authority shown, and it is claimed by defendant there was none in fact, for the witness to make any such statement or agreement for or on behalf of defendant as is here enquired of and stated.

To the 42nd, for the reason that the custom of witness is imcompetent.

Cross-examination:

X int. 1. When did Silas Giddings die?

Ans. September 4th, 1872.

X int. 2. What time of day?

Ans. I do not know.

X int. 3. Then how do you know he died that day?

Ans. His physician told me so.

X int. 4. Did he tell you so that day?

Ans. I think it was the following day.

X int. 5. Were you alone or individually an agent of the defendant?

71 Ans. I was one of the firm acting as agents.

X int. 6. The name of the firm, please?

Ans. Roberts and Hubbard.

X int. 7. Was the appointment of your said firm as such agents verbal or in writing?

Ans. In writing and verbal both.

X int. 8. By whom were you appointed such agents?

Ans. By the general agents of the company, Mess's. Dean and Payne.

X int. 9. Were you appointed more than once?

Ans. The appointment first came by letter, afterwards by a verbal agreement with Mr. Payne at his office in Chicago, and finally by written commission signed by Mess's. Dean and Payne.

X int. 10. Have you the letter you refer to?

Ans. I have it not.

X int. 11. Where is it?

Ans. I couldn't say.

X int. 12. Where did you last see it?

Ans. I had it with me in Chicago at the last time I was here, at the time of taking my testimony in this same case.

X int. 13. Is Exhibit A, attached to your deposition, the letter referred to? (Exhibit A shown to witness)

Ans. It is one of the letters referred to.

72 X int. 14. Have you referred to more than one letter; and if so, where is the other letter or letters that you now refer to?

Ans. I referred to more than one; I couldn't say explicitly where the others are. I had them with me in Chicago at the time of taking the last testimony.

X int. 15. What did you do with them?

Ans. I presume I took them home with me; either that, or I left them with the attorneys, Miller and Frost.

(Solicitor for defendant now calls upon solicitors for complainants, Mess's. Miller and Frost, to produce such letters if they have them, both gentlemen being present.

Solicitors for complainant decline to make any answer by their silence.)

X int. 16. Mr. Roberts, did you ever receive any letter addressed to you or to the firm of which you was a member, dated any time in July in the year 1872?

Ans. My partner received a letter (objection made by defendant's solicitor to any further answer to question, this being a full answer), witness continued) empowering him to engage other parties to take the agency in the event of his not being able to do so himself.

73 X int. 17. Now will you please answer my last interrogatory, and state whether you received any letter written by Mess's. Dean and Payne in July, 1872, and addressed to you or to any firm of which you was then a member?

Ans. Only in the manner answered in the last interrogatory.

X int. 18. Do you in that answer mean to state that there was any such letter addressed to you or to any firm of which you was then a member?

Ans. They were addressed to Mr. Hubbard, my partner.

X int. 19. Was Mr. Hubbard, your partner, July, 1872, as agents for this company?

Ans. I so considered him.

X int. 20. Had you prior to August, 1872, ever had any conversation with Mess's. Dean and Payne, or either of them, as to your being or becoming an agent for this defendant?

Ans. I had not.

X. int. 21. Had you had any such conversation prior to August, 1872, with any other officer or general agent of this defendant?

Ans. I had not.

X int. 22. Did you receive any letter or letters written by Mess's.
74 Dean and Payne addressed to you personally, dated prior to the 20th day of August, 1872, or to any firm of which you was prior to that time a member?

Ans. I did.

X int. 23. Please give the date and to whom addressed.

Ans. I will name one. On the 19th of August, addressed to Roberts and Hubbard.

X int. 24. Is that the only one?

Ans. I could not say.

X int. 25. When and w'ere was the verbal arrangement or conversation that you refer to between yourself and Mr. Payne?

Ans. In the office of Mes'rs Dean and Payne, Chicago, on or about the 6th day of August, 1872.

X int. 26. Did you have more than one such conversation?

Ans. I conversed with Mr. Payne at different times during the day at which I was at his office. I think I was only in the city one day.

X int. 27. Was there that day any agreement between Mr. Payne and yourself to appoint you or any firm of which you was a member, agent or agents for the defendant?

Ans. He confirmed the arrangement which Mr. Hubbard had made with him in regard to the agency.

75 X int. 28. Was there ever any arrangement or agreement appointing you agent of defendant any more comprehensive as to your powers or authority than the one you have referred to as being in writing and signed by the parties?

Ans. My recollection now is that the verbal instructions received from Mr. Payne exceeded the terms of the written commission.

X int. 29. In what respect?

Ans. In the matter of collecting premiums on policies.

X int. 30. What was the difference in that respect?

Ans. He instructed me to collect premiums at the time of delivering policies, while the commission acquired otherwise. By commission I mean the written agreement between the parties?

X int. 31. How many policies of insurance were ever written by defendant, and premiums paid upon applications made by you or your firm?

Ans. None that I know of.

X int. 32. How may loans were ever made by defendant upon applications made by or through you or your firm.

Ans. None ever completed.

X int. 33. Did Mes'rs Dean and Payne or either of them ever make
76 any promise or agreement for a loan to Silas Giddings or for insurance on his life other than upon condition that the same was subject to approval by the company or its officers in Milwaukee?

(Question objected to by complainants' solicitor as leading and incompetent. Question should be, what took place or was laid between Dean and Payne and the witness?)

Ans. They did not during the lifetime of Giddings.

X int. 34. What time in the month of September, 1872, was it that you state that Mr. Glenn laid a thousand dollars on your table?

Ans. During the middle or latter part of the month.

X int. 35. Have you ever had in your possession or under your con-

trol any life insurance policy written by defendant, upon the life of Silas Giddings, senior?

Ans. I have not.

X int. 36. In all cross-interrogatories in speaking of Silas Giddings, I have referred to Silas Giddings, senior. Have you referred to the same man?

Ans. I have; both on direct and cross examination.

77 X int. 37. Do you mean to be understood in your direct examination to state that the company furnished you with the blank applications used in the matters of Mr. Giddings, especially in reference to his making such applications?

Ans. I mean to say they were furnished by the company or their general agents.

X int. 38. To be used especially by Mr. Giddings or by any person who saw fit to make such application?

Ans. By him and other parties who might apply.

X int. 39. Was Mr. Giddings referred to or mentioned, or, so far as you know, known to these general agents at the time you got these blank applications?

Ans. He was not; but he had applied to me for a loan before I received the applications.

X int. 40. To whom was the abstract sent which is referred to in your direct examination, 55th interrogatory?

Ans. It was sent or delivered to Messrs. Dean and Payne.

X int. 41. Well, do you know whether sent or delivered?

Ans. I think that one was delivered.

X int. 42. By whom, to whom, and when and where?

Ans. By myself; to Messrs. Dean and Payne, on or about the 6th of August, 1872, in their office in Chicago.

78 X int. 43. Did you or your firm of Roberts and Hubbard write or cause to be written to Messrs. Dean and Payne a letter dated Monmouth, September 7th, 1872, referring to Mrs. Phœbe Giddings as widow of Mr. Silas Giddings, senior, wherein it is stated "Our Mr. Roberts told her that the application for policy was not accepted yet and that it is a conditional one and to be issued only in want of loaning the money as per application"?

(Question objected to by complainant's solicitors on the ground that the letter itself should be produced, and that its contents cannot be shown in this way, and for the further reason that the rights of the parties are to be determined by the court, and not the opinion of a witness.)

Ans. We had correspondence with the general agents about that time and upon that subject. I couldn't be explicit as to the date and precise language, not having seen the letter since.

X int. 44. Were the words I haven given, or words of that import, so written by you or your firm?

(Objected to by complainants' solicitors for the reasons above stated in the next preceding interrogatory, and for the further reason 79 that the testimony called for is incompetent and immaterial.)

Ans. I am under the impression that they were, but I could not state positively.

X int. 44. Was such the fact?

(Question objected to by complainants' solicitors as leading and incompetent.)

Ans. There was no agreement between Giddings and ourselves as to his accepting either the insurance or loan without the other.

X int. 46. If a letter was written stating in substance as above asked as to what you stated to Mr. Giddings, was that true when written?

(Question objected by complainants' solictors for reasons above stated in three next preceding interrogatories.)

Ans. I understood the two applications to go together.

(Answer objected to by complainants' solicitors as incompetent.)

X int. 47. Did you make the statement to Mrs. Giddings as above given?

(Question objected to by complainants' solicitors for reasons above stated.)

Ans. I cannot now say.

X int. 48. If you did, was it true when you stated it to her?

(Question objected to by complainants' solicitors for the reasons above stated.)

Ans. I don't know if I made such a statement.

80 X int. 49. If you did was it true?

Ans. If I did I so understood it at the time.

(Answer objected to by complainants' solicitors as incompetent.)

X int. 50. If it was stated in letter as above given, did you so understand it at the time such letter was written?

(Question objected to by complainants' solicitors for the reason above stated.)

Ans. If it was so written, I so understood it at the time.

(Answer objected to by complainants' solicitors as incompetent.)

X int. 51. How were you to be compensated for your agency?

(Question objected to by complainants' solicitors as immaterial.)

Ans. By a commission.

X int. 52. Did you ever receive a commission on this Giddings policy or application?

(Question objected to by complainants' solicitors.)

Ans. I did not.

X int. 53. Did you ever claim any from the company or its general agents on this Giddings policy or application?

(Question objected to by complainant's solicitors as immaterial.)

Ans. I don't know that I ever did, but I consulted my attorneys
81 on claiming a commission on all work I ever did or attempted for the company.

X int. 54. Did Mr. Giddings, or any one for him, ever pay any premium on any policy in this company?

Ans. They did not, but tendered the same after his death.

(Defendant's solicitors object to that part of the answer relating to tender for the reason that it is not responsive to the question, and is incompetent, and also object to the answer to the 44th direct interrogatory for the reason that the witness, upon cross-examination, states that at the time of such tender Mr. Giddings was dead.)

X int. 55. Please look at the paper now shown you, a copy of which is hereto attached and marked Defendant's Exhibit 1, and state whether or not it is one of the original applications made by Mr. Giddings, and to which you have referred in your examination.

Ans. I believe that to be the original application for a loan.

X int. 56. Didn't you sign your name to it as witness, and don't you know?

Ans. It is witnessed by my name, and I believe it to be the original document.

X int. 57. Have you any interest in this suit, Mr. Roberts?

82 Ans. In what respect?

X int. 58. In any respect.

Ans. None except to know the ruling of the court in such cases.

X int. 59. Is it that interest that prompts you to come to Chicago two or three times in this case?

Ans. It is not.

PEYTON ROBERTS.

83 *Deposition of John J. Glenn.*

Deposition of JOHN J. GLENN taken before Henry B. Mason, notary public, at Chicago, Cook County, Illinois, on March 4, A. D. 1876.

Int. 1. What is your name, age, and occupation, and where do you reside?

Ans. My name is John J. Glenn; age, 45 years; attorney at law and reside at Monmouth, Illinois.

Int. 2. Were you acquainted with Silas Giddings, senior, in his lifetime?

Ans. I was.

Int. 3. When did he die?

Ans. I only know that by report; I think it was the 5th or 4th of September, 1872.

Int. 4. How far did he live from you?

Ans. Eight or ten miles.

Int. 5. Are you one of the attorneys for the complainants in this case?

Ans. I am.

Int. 6. Did you ever call upon Messrs. Dean and Payne, of Chicago, agents of the defendant, for the purpose of presenting to them proof of the death of Silas Giddings; and making a tender of the premium for an insurance by the defendant of the life of Giddings; if so, when did you do this?

84 (Question objected to as leading, and for the reason that the purpose for which he called is immaterial, and the further reason that if there were any papers they show for themselves their contents.)

Ans. I did. I think that it was the 12th or 13th day of November, 1872.

Int. 7. Please state fully all that transpired at that time.

Ans. In the latter part of the month of October, 1872, I made out proofs of the death of Silas Giddings, senior, and on the 12th or 13th of November, 1872, I came to the city of Chicago, called at the office of Messrs. Dean and Payne, agents for the defendant, and tendered to Mr. Dean, of said firm, $315.00 or $320.00 or about that sum in legal tender notes as the premium for insurance upon the life of said Silas Giddings, and I think at the same time tendered the proof of his death. One was the affidavit of his physician, Doctor William Temple, and the other was an affidavit of a Mr. Miller, a neighbor of his. Mr. Dean refused to accept the money tendered; did not object to the amount nor the kind of money tendered. He refused to have anything to do with the matter, as he claimed the company was not liable.

85 (Answer objected to by defendant's solicitor for the reason that it occurred after the death of Mr. Giddings, and evidence of any tender is incompetent.)

Int. 8. What was said or done by Mr. Dean with reference to the affidavits which you presented to him at that time?

Ans. I am not certain whether the affidavits were left with Mr. Dean or sent to the home office, at Milwaukee. I think one or the other was done.

Int. 9. Did you present these affidavits to him at that time?

Ans. I think I did.

Int. 10. Have you any doubt on that subject?

Ans. No, sir.

Int. 11. What did he do when the affidavits were presented to him?

Ans. I think in the first place, the first time I called on him, Mr. Leander Giddings was with me. He refused to look at them. Subsequently I called on him alone. In that interview I would not be positive whether he looked at them or not, but think he did.

Int. 12. Was this second interview on the same day?

Ans. Yes; and shortly after the first.

Int. 13. If he did look at them at the second interview, did or did he not make any objection to the sufficiency of the proof, and if he
86 said anything on that subject, please state all he said on that subject.

Ans. I think there was no objection made by him to the sufficiency of the affidavits.

Int. 14. Do you know where those affidavits now are?

Ans. I do not.

Int. 15. State all you know about Messrs. Dean and Payne being at the time general agents of the defendant, so far as it had any general agents in this State.

(Question objected by defendant's solicitor, for the reason that the appointment of Dean and Payne is in writing and the terms of their employment cannot be proved in this way.)

Ans. In the first place, I had seen some letters directed to Roberts and Hubbard, Monmouth, Illinois, that purported to have come from them, as the State agents for the defendant, and when I came to this city I found their sign as such agents, and they did not, or Mr. Dean did not, deny to me but what he was acting for them. I enquired of Mr. Dean whether he was acting for the company *for the company* when I first went in, and he said he was.

JOHN J. GLENN.

87 *Testimony of Oscar Payne.*

Deposition of OSCAR PAYNE taken before John Gray, notary public, on May 24, A. D. 1876, at Chicago, Cook County, Illinois.

By Mr. HORTON:

Q. What is your name?

A. Oscar Payne.

Q. What is your business?

A. Insurance man.

Q. Member of any firm; if so, what?

A. Member of the firm of Dean and Payne.

Q. Doing business where?

A. In Chicago, in the State of Illinois.

Q. Are that firm agents of the defendant, the Northwestern Mutual Life?

A. Yes, sir.

Q. Were you agents in the year 1872?

A. Yes, sir; we were.

Q. Do you know Peyton Roberts, a resident of Monmouth, Warren County, in this State?

A. Yes, sir.

Q. State whether or not he or any member of the firm of which he was a member were ever local agents of this insurance company; if so, where and when?

A. He is a member of the firm Roberts and Hubbard, of Monmouth, Illinois; they have been local agents of the company at Monmouth, Illinois. They were appointed agents, it w s some time, I think, in
88 the last of August or first of September, along about that time, in 1872. I cannot swear to the day they were appointed.

Q. Did you personally, as a member of the firm of Dean and Payne, have any correspondence with Mr. Roberts individually?

A. No, sir; I think not.

Q. Did your firm have any correspondence with Roberts and Hubbard in regard to the business of this company?

A. Well, I cannot state as to that for this very reason: my business is in the field, in the country, and it is very seldom that I ever wrote to an agent from our office.

Q. Did you personally, then, ever write to them?

A. I never wrote to the firm of Roberts and Hubbard in my life; nor Mr. Roberts in relation to the business of this company.

Q. State whether or not Mr. Roberts was the partner of Hubbard on the 26th of July, 1872, to your knowledge?

A. Not to my knowledge he was not.

Q. When did you first learn such to be the fact?

A. That he was appointed agent?

Q. That Roberts was the partner of Hubbard?

A. It was some time in August.

Q. 1872?

89 A. Yes, sir.

Q. Did you see Mr. Roberts in your office in Chicago any time in the month of August, 1872?

A. Yes, sir.

Q. What time in the month?

A. It was along the fore part of the month.

Q. Have any conversation with him in regard to applications for insurance?

A. Yes, sir.

Q. Who else was present, if any one?

A. Our cashier was there, Mr. Day. I don't recollect of any one else being in the office at that time. We had a boy there. He might have been there and might not; I cannot say.

Q. State whether or not at that time Mr. Roberts gave to you any application for insurance or loan from this defendant company for Silas Giddings, senior.

A. He had an application for a loan and for the life insurance at the time he was in the office at that time.

Q. What did he do with them?

A. He left them there with us.

Q. What was the amount of insurance applied for?

A. I think it was six thousand dollars.

Q. What was the amount of loan applied for?

A. Six thousand dollars.

90 Q. What, if anything, did Mr. Roberts say at that time as to

whether or not Mr. Giddings wanted or would accept insurance unless a loan was made?

(Counsel for the plaintiffs objected to the question as leading and incompetent.)

A. He said that Mr. Giddings wanted a six thousand dollar loan, and I looked the application over, and expressed my doubts about the company granting so much money on the security, and he said there is no use to talk, he could not get along with anything less and must have that or else he would not take it, and he went on to press the claim. He said that the security was good and that the quality of the land was good; the company ought to grant that amount of loan on the land.

Q. What, if anything, was stated in that conversation as to Mr. Giddings accepting the policy of insurance if his application was approved by the company in case the application for loan was not accepted by the company?

(Counsel for plaintiffs objected to the question as leading and incompetent.)

A. He said the insurance was based wholly on the loan, and that if he could not get the loan he would not take the insurance.

91 Q. Was there ever more than one time when any such conversation occurred between Mr. Roberts and yourself here at your office?

(Counsel for plaintiffs objected to the question as leading and incompetent.)

A. Yes, sir.

Q. I refer now entirely to the time when he delivered you the application. Was there more than one conversation at that time or on that day or other days?

A. Well, I talked with him several times during that day, and I had conversation with him after that.

Q. State whether or not Mr. Roberts was at the time of this conversation, at the time he delivered the application to you, an agent of the company?

A. He was not to my knowledge.

Q. Mr. Roberts in his deposition has stated as follows, "I also told them" (referring to Dean and Payne) "that I had said to Mr. Giddings that I thought five thousand dollars would be all the company would care to loan on the security, and that he said that the sum would be satisfactory to him in the event of the company's objecting to loaning more." State whether any conversation of that kind ever occurred with you or between yourself and Mr. Roberts?

(Counsel for the plaintiff objected to the question as leading and incompetent.)

92 A. We talked over the matter of security, and I expressed a very great doubt about the company being willing to loan as much money on that security, and he pressed the claim that it was ample security, and that Mr. Giddings would not accept it unless he could get the six thousand dollars, and he would not take the life policy unless he could get the loan of six thousand dollars. It was wholly based on that.

Q. What is the extent of the authority or agency of Dean and Payne, in regard to loans for this company?

A. We have no contracts for loan agencies at all; we are appointed as insurance agents.

Q. I refer more especially to the question of whether they were authorized to accept loans?

A. No, sir; we were not.

Q. Or to make them?

A. We make loans on our agency here under the direction of the company; we never accepted a loan.

Q. What authority have you, if any, as to the accepting of insurance, or of applications for insurance?

A. No authority, only to take the applications and send them forward to the company for approval.

Q. Have you any further authority than that, as to loans?

93 A. No, sir.

Q. Or had you any further authority as to either of these in 1872?

A. No, sir.

Q. Had you or your firm furnished to Mr. Roberts, prior to the time of this conversation in your office, any blanks or blank application for loans or for life insurance in this company?

A. None to my knowledge; as I stated before, I am in the field a good deal, and Mr. Dean more especially sends out supplies to different parties; at this time he was not appointed agent of the company.

Q. Mr. Roberts was not?

A. Roberts was not.

Q. What papers, if any, did Mr. Roberts furnish to you at the time he furnished the application for loan and insurance?

A. Nothing except the application for loan and insurance; no other papers.

Q. Did he ever furnish you an abstract of title of this Giddings property?

A. No, sir.

Q. State whether to your knowledge one ever was furnished?

A. None was ever furnished to my knowledge. I never saw one.

Q. Who, if any one, ever paid any premium for insurance in this company on the life of Silas Giddings, senior?

94 A. I know of no one who ever paid any premium.

Q. Was there ever any proof of loss or proof of the death of Silas Giddings, senior, furnished to this company?

A. Not to my knowledge.

Q. Did you ever have any talk with Mr. Roberts about this matter after this early part of August when he gave you the applications?

A. Yes, sir.

Q. When next?

A. About the middle of September.

Q. Where?

A. At Monmouth.

Q. What was it?

(Counsel for the plaintiff objected to the question as incompetent, irrelevant, and immaterial.)

A. I was down at Monmouth in Mr. Roberts' office, and he told me that Mr. Giddings was dead; it was the first time I had heard of it; and he said some of his friends were going to try to collect the money on the insurance policy: nd he told me that they had no claim whatever; they could not do it; tha he never would take the insurance if the loan had not been made, that the insurance was based wholly on the loan, and if he had ever got the loan he would have taken his insurance, if he hadn't he would not.

95 (Counsel for plaintiff further objects to the testimony on the ground that no foundation is laid for it.)

Q. Do you know whether or not the application for the loan of six

thousand dollars was accepted or rejected by the company; I mean the Giddings loan, of course?

A. I don't know.

Q. Do you know whether or not the company made an offer to Mr. Giddings to loan him any other sum on this security?

Mr. FROST. We object unless the witness can state from his own personal knowledge, not from what the company has told him.

Q. I never have seen any papers to that effect.

Mr. HORTON:

Q. Did Mr. Giddings ever make any application for insurance in this company other than that made by Mr. Roberts?

A. Not to my knowledge.

Q. Did he ever make application for a loan from the company other than that application from Mr. Roberts?

A. None to my knowledge.

Cross-examination by Mr. MILLER:

Q. Can you state the day of the month when this conversation with Mr. Roberts took place at the time these applications were handed to you?

A. No, sir; I cannot state the day.

Q. Can you state the month?

96 A. It was in August, 1872; along the forepart of August; somewhere between the 5th and 10th or 12th; along there somewhere.

Q. How do you fix the day between these dates?

A. Well, I have a way of doing it. It was the time Mr. Dean was away. I attended Mr. Dean's wedding on the night of the first of August; he went away on the night of the first on a pleasure trip, and Mr. Roberts came into our office a few days after that; somewhere from five to eight days; along there somewhere.

Q. Have you any other circumstance by which you can fix the time than the one you have mentioned?

A. No, sir; I don't think I have.

Q. What time of day was it?

A. That he was in there?

Q. Yes.

A. I think it was in the afternoon.

Q. What makes you think it was in the afternoon?

A. From the very reason I had been to dinner.

Q. How do you know you had been to dinner?

A. I was there at the time I ate.

Q. Do you recollect the fact that you had taken dinner before he called in?

A. I think it is a fact.

97 Q. Are you ready to swear positively that is a fact?

A. I am not ready to swear positively, but I think that is the fact.

Q. It may have been morning he called?

A. Possibly.

Q. Was there any one in the office when he called?

A. Yes, sir.

Q. Who was it?

A. Mr. Day.

Q. What makes you think Mr. Day was there?

A. Because I saw him there.

Q. Did he take any part in the conversation?
A. Yes, sir.
Q. What part did he take in it?
A. Well, nothing specially.
Q. I am not asking you what he said.
A. Nothing special; only when Mr. Roberts first came in, I was not in, and Mr. Day entertained him when he first came in, and he went out and came in afterwards and I was in and Mr. Day was there at the same time.
Q. What was Mr. Day doing while you were together?
A. He is our bookkeeper.
Q. What was he engaged in while you and Roberts were talking together?
A. He was writing at his desk.
Q. Continue writing all the while?
A. Well, most of the time.
Q. You recollect that fact distinctly, do you?
A. Yes, sir.
98 Q. How far did you sit from him?
A. I should think perhaps as far as the book-case there.
Q. About ten feet?
A. Ten to twelve feet.
Q. You know that he was writing while you were there?
A. Yes, sir.
Q. Who introduced Mr. Roberts to you?
A. Not any one.
Q. You had seen him before then?
A. Yes, sir.
Q. You was well acquainted with him?
A. I had been partially acquainted with him for several years.
Q. You didn't require any introduction?
A. Not necessarily.
Q. Were the applications dated?
A. I could not swear to that.
Q. Did you read the applications?
A. I don't think I read them all through; I looked them over.
Q. Was there any papers showing an appraisal of this property by any of the parties down there?
A. I think there was.
Q. Are you sure whether there was or not?
A. Yes, sir.
Q. Do you recollect how much they fixed it at?
A. I do not.
Q. You haven't any idea?
A. No, sir; I haven't now.
99 Q. Upon what did you base your estimate of the value of the property?
A. At that time?
Q. Yes.
A. The loan was over one-third the valuation of the same.
Q. But you paid no attention to the valuation at that time, I understand you to say?
A. I did at that time.
Q. You did at that time?
A. Yes, sir.
Q. Do you recollect now what the valuation was?

A. I do not now.
Q. Wasn't it $18,500.00?
A. I cannot tell you what it was.
Q. If it was that, then the six thousand dollars was less than one-third, wasn't it?
A. If it was that.
Q. Do you recollect whether the sum was not more or less than one-third of the valuation?
A. I cannot swear to it now.
Q. You had never seen the land, had you?
A. No, sir; I never saw the land.
Q. Knew nothing about its value?
A. I know nothing about that particular piece of land. I am generally pretty well acquainted over the State.
Q. How many acres were there?
A. I don't remember.
Q. Wasn't there three quarter-sections?
A. That I don't recollect.
100 Q. Why were you so positive in saying that the company would not take the six thousand dollars?
A. From the very fact that it was my impression at that time the land was overvalued.
Q. You thought the valuation was too high?
A. As my judgment went.
Q. What made you think the valuation was too high?
A. From this very fact: I have traveled over this State for twelve years, and know pretty well the valuation of land all over the State.
Q. You had an idea then at that time of the valuation of the land, had you?
A. In my own judgment.
Q. What did you think that land was worth?
A. Not that particular piece of land especially.
Q. What did you think the land embraced in that application was worth?
A. My impression was it was worth somewhere from twenty to thirty dollars per acre.
Q. From twenty to thirty dollars an acre?
A. Somewhere there.
Q. Do you know whether it was improved land or not?
A. I think he told me it was improved land.
Q. Do you recollect the character of the improvements upon it?
A. I do not now; no, sir.
101 Q. That would affect its value somewhat, wouldn't it?
A. It would affect it just as much as the improvements were actually worth.
Q. And you don't know what they were worth?
A. No, sir.
Q. All you can say is your general judgment of the value of land in that vicinity was from twenty to thirty dollars an acre?
A. That was my judgment at that time.
Q. How many acres were there?
A. I don't recollect.
Q. Wasn't there over three hundred acres?
A. I don't remember how many there was.
Q. But your opinion about the value of the loan, the goodness of the

loan, was based upon your judgment of the value of the land rather than what the parties had estimated it at?

A. Yes, sir.

Q. You didn't pay much attention to that?

A. What they valued it at?

Q. Yes.

A. Not specially so much as my own personal knowledge of the land.

Q. That you are positive of, are you?

A. Yes, sir.

Q. How much too high did you think they had valued it?

A. I don't know; I don't recollect now what the valuation
102 was that was placed on the land. I know I looked it over and in my judgment I thought the valuation was too high.

Q. How much too high did you think?

A. The difference between what it was valued at and say twenty-five dollars an acre.

Q. You think you fix' it at about twenty-five dollars an acre, and theirs was a good deal higher than that?

A. I think theirs was higher than that.

Q. And you fixed it at about twenty-five dollars an acre?

A. In my own estimation.

Q. And that is the way you fixed your estimate of this loan?

A. Yes, sir.

Q. And that is the basis upon which you said the loan was too high?

A. I expressed my doubts about it, it being too high a valuation.

Q. It is the usual thing, isn't it, for applications to be made to your office for loans by this company?

A. It is not an uncommon thing for parties to send applications through our office to the home office.

Q. Your agents in the country frequently send you applications of this character, don't they, to be transmitted to Milwaukee?

A. They have done such a thing.

Q. Isn't it a matter of frequent occurrence?

A. Not very frequent.

103 Q. How many have been done within the last year?

A. I don't think there has been one.

Q. Not from the country?

A. I don't think there has been one. Not to my knowledge there has not been one. There may have been a few.

Q. Not within the last year?

A. No, sir.

Q. You haven't loaned as much as you did in 1872?

A. I don't think we have.

Q. How many during the year 1872 of such applications were sent to the company through your office?

A. I have no means of giving any estimate.

Q. Give some sort of an estimate.

A. I could not do it.

Q. As many as a hundred?

A. I don't think there was.

Q. Fifty?

A. I don't think there was.

Q. Twenty-five?

A. Possibly.

Q. You didn't pay particular attention to this branch of the business, did you?

A. Not specially; no, sir.
Q. What are your duties generally confined to?
A. Life insurance; working up life insurance.
Q. Working it up; what do you mean by that?
A. Getting applications for life insurance for the company.
Q. In different parts of the States?
104 A. Yes, sir.
Q. How many different States do you go into?
A. Only Illinois.
Q. How much of the time are you away from the office?
A. Three-quarters of the time.
Q. Out in the country?
A. Yes, sir.
Q. Are there any other general agents of the company in this State but Dean and Payne?
A. None to my knowledge.
Q. Would you know it if they had any; would you be likely to know it if they had any?
A. I should be very likely to.
Q. Any doubt about that?
A. No, sir.
Q. Then they haven't any other agents in this State except Dean and Payne, have they?
A. No, sir.
Q. Then your jurisdiction extends all over the State of Illinois, does it?
A. Except Rock Island County.
Q. You have a contract with the company under which you are working for them, haven't you?
A. Yes, sir.
Q. That defines your powers, don't it?
A. To work up life insurance.
Q. That defines your powers, don't it?
105 A. Yes, sir.
Q. Do you keep copies of your letters that you send to the home office?
A. Yes, sir.
Q. Did you transmit these applications to the home office?
A. I did not.
Q. Did your company?
A. Our agency did, I think.
Q. Have you ever seen the letter containing such transmission?
A. No, sir.
Q. You kept a copy of it, didn't you?
A. I think there is a copy of it; I could not swear that there was; it is our custom to keep copies of all the letters going from the office.
Q. Going from your office?
A. Yes, sir.
Q. Your company received the policy, didn't you, for six thousand dollars ($6,000)?
A. Not to my knowledge.
Q. Do you know whether they did, or not?
A. No, sir; I don't know it.
Q. You say about the proofs of the death of this man, that they were not handed in, you say, to your knowledge?
A. I never saw them; I never knew it was sent in.

Q. You don't know whether it was or not, then?

A. No, sir; I do not.

106 Q. When was your attention first called to this conversation since it took place?

A. At Mr. Roberts' office, in Monmouth.

Q. When was it after that—did he call your attention to the conversation—Mr. Roberts?

A. He spoke about the death of this Mr. Giddings.

Q. I mean this conversation between you and Mr. Roberts when the applications were handed in; when was your attention first called to that since it took place?

A. I don't know as I understand the question.

Q. When was your attention first called to the conversation you had with Mr. Roberts when he handed in these applications after it occurred?

A. Not until recently.

Q. When?

A. Perhaps within five or six weeks or two months; I cannot say exactly.

Q. Cannot you fix the time?

A. No, sir.

Q. Cannot you fix it within three weeks?

A. I don't think I can.

Q. Who called your attention to it?

A. Well, we was talking it over there in the office.

Q. Who called your attention to it?

A. I cannot say about that.

Q. Who was talking it over there in the office?

107 A. Mr. Day, our bookkeeper, said something about their making a claim for a policy; that is the first I had heard of it; I think it was Mr. Day or Mr. Dean; I cannot say which.

Q. Mr. Dean or some one told you they were making a claim for a policy?

A. Yes, sir.

Q. That is the first of your ever hearing of their making any claim?

A. No, sir.

Q. That is the way your attention was called to this conversation?

A. The first time I heard about it was from Mr. Roberts.

Q. That is the way your attention was called to this conversation?

A. That was in September following, or August, 1872.

Q. Was that the way your attention was first called to this conversation you have spoken about between yourself and Roberts, when the applications were handed in?

A. Your question is, whether my attention was called to it after I had that conversation with Mr. Roberts at Monmouth?

Q. Yes; since that time.

A. I say I cannot tell; but some time within two or three months.

Q. Some time within two or three months; where was i

A. It was in our office.

108 Q. Here in Chicago?

A. Yes, sir.

Q. Who was present?

A. I think it was Mr. Dean was present, and I think Mr. Day was; we talked it over.

Q. Are you sure about that, that they were both present?

A. No, sir; I am not sure about that.

Q. Are you sure either of them was present?
A. I am very sure one of them was present.
Q. Which?
A. I cannot tell you which, sir; it is a common thing to talk over business matters.
Q. How was your attention called to it?
A. Simply from the fact that this man Gidding's family was making a claim upon the company for the policy they claimed on that life insurance.
Q. How did you know that they were making a claim; who said they were at that time?
A. I said I cannot tell now who it was; I cannot tell you.
Q. Somebody said they was making a claim upon the company.
A. I got the information in the office; sometime' when I have been in the office I would go off and be gone three or four weeks.
Q. Did any further talk take place between you there?
109 A. No, sir; nothing much more about it; I don't recollect anything more.
Q. All that took place at that time was simply these parties were making a claim?
A. Yes, sir.
Q. Nothing further was said?
A. Nothing more said about it.
Q. Nothing said about that conversation then at that time?
A. At that time there was not.
Q. When was that conversation referred to?
A. The conversation with Roberts?
Q. Yes; when was your attention called to it?
A. I cannot answer that question. Some time, I say, within two or three months.
Q. You have mentioned one circumstance one time; but it appears nothing was said about it then.
A. Nothing more than it was said they were making a claim on the company.
Q. But there was nothing said at that time about your conversation with Roberts?
A. No, sir.
Q. When was anything said about your conversation with Roberts for the first time?
A. In our office?
Q. Yes.
A. I think Mr. Dean asked me some time within two or three days what my recollection was in relation to the circumstances.
110 Q. That was two or three days ago?
A. Yes, sir.
Q. Fix the day, if you please.
A. What day of the week is to-day?
Q. To day is Wednesday.
A. I will say, perhaps, last Monday.
Q. Then it was the day before yesterday?
A. Yes, sir.
Q. He then asked you—Mr. Dean did?
A. Yes, sir.
Q. What conversation you had with Roberts——
A. No, sir.
Q. What did he ask you?

A. He asked me what my recollections were in relation to the circumstances about the insurance policy and the loan—the time they were sent forward.

Q. Did he ask you about your conversation with Roberts?

A. No, sir.

Q. Was anything said about your conversation with Roberts?

A. No, sir; didn't ask me about that.

Q. You didn't tell him?

A. No, sir.

Q. What your conversation with Roberts was when the application was made?

A. No, sir.

Q. Never referred to that?

A. No, sir.

Q. When have you referred to that?

A. I have not referred to it at all.

111 Q. Haven't you referred to it in your examination here?

A. Except here. I am talking about it now.

Q. Do you mean to be understood as saying you have never stated the details of that conversation to any one until you testified to it here as a witness?

A. I mean to say I haven't had that conversation with Mr. Dean today.

Q. Do you mean to say you haven't referred to it with any one?

A. No, sir.

Q. Have you?

A. Yes, sir.

Q. With whom?

A. Mr. Day.

Q. What Mr. Day?

A. Our bookkeeper.

Q. When?

A. I think it was yesterday.

Q. How happened you to ask him about it?

A. I don't know whether he asked me about it or I him; I know we talked about it some.

Q. You and he talked together about it yesterday?

A. I think it was yesterday.

Q. About that particular conversation?

A. Not specially about the conversation; it was about the manner of Mr. Roberts bringing in the application—what I recollect about it.

Q. I mean your conversation with Roberts. You talked about

112 your conversation with Roberts, did you?

A. Talked about his bringing the applications in; nothing special about my conversation with him.

Q. Didn't you and they talk over with each other as to what Roberts said when he presented these applications to you?

A. We might have done it.

Q. Did you?

A. I think I told Mr. Day what my recollection was about it.

Q. Did you tell him what your recollection was as to what Mr. Roberts said when he presented those applications?

A. I think I told him what my recollections were.

Q. Did you tell him your recollection of what Roberts said?

A. What Roberts said at that time?

Q. Yes.

A. I think I told him.
Q. Have you any doubt about it?
A. Not a particle.
Q. Then why do you say you think you told him?
A. I have no particular reason why I say I think I told him.
Q. Then you did tell him?
A. Yes, sir.
Q. What Mr. Roberts said?
A. Yes, sir.
Q. What did he say about it; did he say anything about it?
113 A. He didn't make any reply to it specially either way.
Q. Didn't say what he understood Mr. Roberts to say?
A. No, sir.
Q. Did he say anything on that subject as to what he understood Mr. Roberts to say?
A. He did not say very much about it. He said *he said* he was busy at his desk at the time he was in there.
Q. Didn't pay much attention to it?
A. Didn't pay much attention to it.
Q. So he didn't recollect anything about it?
A. He didn't say about that what he recollected.
Q. But he said he didn't pay much attention to it?
A. Yes, sir.
Q. And he was busy writing at his desk at that time?
A. Yes; he said he was busy at his desk.
Q. Was that immediately after you told him what you recollected?
A. I think it was; yes, sir.
Q. He did not pretend to have heard it, did he?
A. He did not say much about it any way; he was busy writing down there, and didn't make much reply to me.
Q. He said he was busy writing when you and Roberts were together?
A. Yes, sir.
114 Q Did you say anything to him about your conversation with Roberts down to Monmouth?
A. To Mr. Day?
Q. Yes.
A. No, sir.
Q. Did you ever to anybody?
A. Do you mean previous to this?
Q Previous to your testifying here?
A. Yes, sir.
Q. To whom?
A. I told Mr. Dean about it.
Q. When?
A. I guess it was to-day.
Q. To-day? Is that the first time you have spoken of it?
A. I don't think I have ever spoke of it before to-day to any man.
Q. And you mentioned it to Mr. Dean?
A. Yes, sir.
Q. When to-day—what time?
A. It was just before dinner.
Q. Where?
A. Down in our office.
Q. You have never mentioned it to anybody else until you testified to-day here on the stand, except to Mr. Dean just before dinner?

Mr. HORTON. He didn't say that.

Mr. MILLER:

Q. Did you ever mention it to anybody else except to Mr. Dean just before dinner?

115 A. Yes, sir.

Q. Who?

A. I mentioned it to Mr. Horton.

Q. When?

A. Since I come in here this afternoon.

Q. Have you ever mentioned it to anybody else?

A. I don't recollect that I ever did.

Q. But you have never mentioned your conversation with Roberts at the time the applications were handed in except to Mr. Day on Monday last?

Mr. HORTON. That is not fair.

A. I don't recollect I ever did. I will state the reason. You may think I am a little mixed on it. I have very little to do with our office here.

Mr. MILLER:

Q. Have you ever to any one mentioned the conversation you had with Mr. Roberts when the applications were handed in, other than to Mr. Day on last Monday, prior to testifying here on the stand to-day?

A. Yes, sir; I spoke to Mr. Dean about it to-day.

Q. What time to-day?

A. Just before dinner.

Q. That is the conversation you had with Mr. Roberts?

A. Yes, sir.

Q. Then you told him that?

A. Yes, sir.

116 Q. Have you to any one else?

A. Mr. Horton here.

Q. When did you mention it to Mr. Horton?

A. Since I came in here. Perhaps five minutes before you came in.

Q. What did Mr. Horton ask you?

A. He didn't ask anything specially.

Q. What did you say to Mr. Horton?

A. I told him what Mr. Roberts said.

Q. What did you tell him Mr. Roberts said?

A. I told him Mr. Roberts said the insurance was based on the loan; unless the loan was effected the insurance would not be taken.

Q. Is that all you told Mr. Horton?

A. It is about the substance of it.

Q. Did you tell him anything else than that?

A. I cannot think of anything special I told him besides that.

Q. You don't know of anything else you did tell him except that fact?

A. No, sir; we talked here about one thing and another.

Q. What other things did you talk about?

(Objected to.)

A. That was all we talked about—simply told him.

Q. What other things did you talk about?

A. I come in here and he was smoking. I took a cigar out and asked him to let me have his fire to light my cigar with.

117 Q. You have stated now all you can recollect of this conversation, have you, substantially?

A. What I said to Mr. Horton?

A. Yes, sir, every word of it.

Q. Now what did you say to Mr. Dean, just before dinner?

A. I said to him that in looking over my expense book, that I keep while I am off on the road, the fare from one town to another and expenses in the town, that I found on my expense book that I was in Monmouth on the 16th day of September, 1872, and at that time I had some conversation with Mr. Roberts in relation to Mr. Giddings' death——

Q. You need not state what you told him about that conversation down there.

Mr. HORTON. I insist he shall be allowed to answer the question.

Mr. MILLER.

Witness goes on subject to plaintiff's objection.

A. And that Mr. Roberts told me Giddings was dead; it was the first time I had known anything about it, and that the family friends, some of them—I don't recollect who he said, but the friends of Mr. Giddings—were talking about making a claim on the company for the policy, and that he said it was no use for them to try to do it, that they had
118 no claim whatever. That that insurance was based on that loan, and if the loan was never made, the insurance would never have been taken; and Mr. Dean didn't say "ah, yes," nor "no" to it. I don't know as he replied to me.

Q. Is that all you said to him?

A. That is all I said to him.

Q. Before dinner?

A. Before dinner or after dinner.

Q. Are you sure that is all you said to him?

A. I am very positive indeed.

Q. Positive as you are of anything else you have testified to?

A. Yes, sir.

Q. Why did you say a moment ago, then, that you told Mr. Dean just before dinner about the conversation you had with Roberts when these applications for insurance were made?

A. This is the time.

Q. But you speak now of a conversation you had with Roberts down at Monmouth?

A. I told you before this it was two or three months ago, perhaps; it was talked about in the office before.

119 Q. Did you have any conversation with Mr. Dean just before dinner to-day, with reference to what Roberts said when these applications were handed in?

A. No, sir; this is the conversation we had down to Monmouth.

Q. That is the conversation I was enquiring about.

A. Yes, sir.

Q. Did you have any conversation, or did you ever have any talk with any one other than Mr. Day, your bookkeeper, with reference to what Roberts said when the applications were handed in prior to the conversation you had with Mr. Horton just before this conversation took place?

A. I don't think I have ever mentioned it to any live man or woman.

Q. Kept it all to yourself?

A. Kept it all to myself; the whole of it.

Q. Did you ever make a memorandum of this conversation at any time?

A. No, sir, never did.

Q. I understood you to say you knew nothing about the policy of the company sent down from Milwaukee to this office?
A. Yes, sir; I said so.
Q. Do you have anything to do with the correspondence between this office and Milwaukee?
A. Occasionally I write a letter, not often.
Q. Who attends to the correspondence?
120 A. Mr. Dean; usually Mr. Dean and the bookkeeper.
Q. Who transmitted these applications to Milwaukee?
A. I cannot tell that, sir; I do not know.
Q. You did not yourself?
A. No, sir.
Q. Mr. Dean has charge of the correspondence?
A. Yes, sir.

Mr. HORTON:

Q. Please look at that, and state whether or not that is the original application for the loan which Mr. Roberts gave you?
A. I should think it was, sir.

OSCAR PAYNE.

121 *Testimony of John E. Dean.*

Deposition of JOHN E. DEAN, taken before John Gray, notary public, on May 24, A. D. 1876, at Chicago, Cook County, Illinois.

Direct examination by Mr. HORTON:

Q. What is your name?
A. John E. Dean.
Q. What is your business, Mr. Dean?
A. Life insurance.
Q. Member of any firm? If so, what?
A. Member of the firm of Dean and Payne.
Q. Are your firm agents for the defendant here—the Northwestern Mutual Life?
A. Yes, sir.
Q. Who were the general agents of this company in Illinois in 1872?
A. Dean and Payne.
Q. Do you know Peyton Roberts?
A. I am slightly acquainted with him.
Q. When did you first see him?
A. When he was making his deposition, in Chicago.
Q. Had you known of him before?
A. I had.
Q. State whether or not he was at any time one of the agents of this company.
A. Mess'rs Roberts and Hubbard were at one time agents at Monmouth.
Q. When?
A. After the month of August, 1872.
Q. Who has charge of the correspondence of your firm at Chicago?
122 A. I have.
Q. Was there any correspondence between your firm and Mr. Roberts, or any firm of which Mr. Roberts was a member, in regard to insurance business, in the month of July, 1872?
A. There was not.

Q. Was there in the month of August, 1872?
A. The first letter written was on the 19th day of August.
Q. When were Roberts and Hubbard appointed agents?
A. The contract was written the 19th of August and executed about ten days after.
Q. Was Roberts agent prior to that time or not?
A. He was not; no, sir. I knew nothing about Mr. Roberts prior to that time; I had never known of him personally.
Q. Who has charge of the distribution of blanks, and so forth, which I believe you call supplies?
A. They were sent out under my supervision and directions.
Q. Please look at the letter attached as Exhibit A to the deposition of Mr. Roberts, and state whether or not the writing of that had any connection with Mr. Roberts.

123 A. The original was addressed to Mr. Hubbard solely and alone. We knew nothing about Mr. Roberts; was not writing to him; had nothing to do with him; and he was in no wise an agent of ours.

Q. State whether or not you furnished to Mr. Roberts any blanks prior to the time of making this, the 19th of August, 1872.
A. We did not.
Q. Had you any conversation or did you hear any with Mr. Roberts in regard to an application for a loan or insurance upon the part of Silas Giddings?
A. I did not.
Q. Had any proofs of loss or of the death of Silas Giddings, senior, been made to this defendant at all?
A. None were sent through our office.
Q. State whether or not there was ever furnished to you or to your office an abstract of title, by or on the part of Mr. Giddings, of the premises embraced in his application for a loan.
A. There was not.
Q. Do you know whether or not Mr. Giddings' application for a loan was accepted or rejected by the company?
A. His application for six thousand dollars was rejected—declined by the company.

124 Q. Was any premium ever paid to you or to your firm upon any life insurance upon the life of Silas Giddings, senior? If so, when?

A. There was not.
Q. Did Mr. Glenn, one of the plaintiff's attorneys of this case, ever call upon you, in Chicago, in regard to this matter?
A. I think he did.
Q. State whether or not he tendered to you any proofs of loss upon the death of Silas Giddings, senior.
A. He did not.
Q. Or whether he or any one else furnished any to you?
A. No proofs of claim or loss were ever furnished by any one to our office.
Q. Have the firm of Dean and Payne authority to accept or otherwise dispose of applications for loans or applications for insurance?
(Counsel for the plaintiffs objected to the question on the ground that the authority of the firm is in writing, and that the question calls for the opinion of the witness in reference to the effect of that writing.)

A. We have no authority to accept applications for insurance or applications for loans on behalf of the company, and are in no wise loan-agents of the company, and have no contracts with the company
125 regarding loans, and never have had any contract with them or authority from them to accept or negotiate loans or to appoint loan-agents for them. The company has no loan-agents. Applications for loans are sent to whoever applies for them. They are addressed direct to the executive committee of the company, and it is the custom of the company to send blank applications for loans out to parties asking for them.

Cross-examination by Mr. MILLER:

Q. Did you write this letter to B. T. O. Hubbard of July 25, 1872, a copy of which has been shown to you?

A. I did.

Q. Did you enclose a lot of blank applications for insurance and loans to him in that letter?

A. Supplies were sent to Mr. Hubbard.

Q. Did they consist of blank applications for loans and for insurance?

A. I am unable to state whether any blank applications were enclosed; general supplies were sent.

Q. You say in this letter: "We herewith hand you loan blanks, and also send you to-day by express insurance blanks, of which you will have need."

A. It is very likely they were enclosed.

Q. You haven't any doubt about it, have you?

A. No reasonable doubt.

126 Q. How long had he acted for the company at that time at Monmouth?

A. He had not acted for them.

Q. Had you previous to that time informed him of the terms upon which the company insured and loaned and so forth?

A. Not specially.

Q. You say in this letter: "Our terms you have in letter of July 19th." Did that embrace these terms?

A. We probably sent him a book of rates in our correspondence. We hold no correspondence with anybody regarding rates, because those are fixed by the company.

Q. You had sent him these?

A. I presume we had.

Q. With the view of his taking applications for insurance, hadn't you?

A. That was the object of our correspondence.

Q. And taking applications for loans?

A. Not specially; no, sir.

Q. What did you send him these blanks for?

A. We frequently send blank applications to agents.

Q. What did you send him these blanks for?

A. I have no particular reason for sending him these applications.

Q. Wasn't it for him to use them?

A. If anybody wanted them.

Q. You expected he would use them, didn't you?

A. If he found use for them.

127 Q. Look at the original application for the loan here which has been introduced in evidence, and state whether that is one of the blanks you sent to him.

A. I cannot tell you.
Q. What do you think about it? Just look at it.
A. My recollection is that these were the forms that were used by the company at that date.
Q. What do you say as to whether that is one of the blanks you sent to him?
A. I have no reason to doubt it, and no reason to believe it particularly.
Q. You don't think you have any reason to believe it?
A. I have no reason to doubt it, and no reason to believe it particularly.
Q. Do you mean to say you haven't any reason one side or the other as to whether that is one of the blanks or not?
A. I mean to say just what I have answered.
Q. Have you any opinion about it as to whether that is one of the blanks or not?
A. I could not tell you whether that is one of the blanks or not.
Q. Have you any opinion about it?
A. My opinion is it is one of the blanks in use by the company at that time, and very likely sent to Hubbard.
128 Q. Is it your opinion that is one of the blanks sent to him?
A. My opinion is just what I have heretofore stated.
Q. Will you please answer the question whether it is your opinion that is one of the blanks you sent to him?
A. It may be.
Q. What do you think about it; is it or is it not?
A. It very likely is.
A. Is it or is it not?
A. I have no further answer to the question.
Q. Do you decline to say, then, whether you have any opinion upon the subject?
Q. I decline to answer the question any further.
Q. Where did he get that blank if he didn't get it from you?
A. He may have got it from the company.
Q. Have you any reason to suppose he got it from the company?
A. I have, because it is the custom of the company to send applications to anybody who applies for them.
Q. Did you ever hear of his applying to the company for blanks except through you?
A. I don't think I have.
Q. Have you any reason to suppose that he ever did apply to the company for blanks?
A. I have reason to suppose that he did, because it is the
129 custom of parties frequently to write to the company for blanks when they want to make applications for loans, and Mr. Hubbard, being a banker, and being situated in a country where there are loans wanted, would very naturally write direct to the company, not knowing anything about us.
Q. You wish to be understood as saying, then, that you are still inclined to think he may have got that from the company directly?
A. I think he may have got it from the company.
Q. Notwithstanding you sent the same blanks to him on the 19th of July?
A. I haven't said I sent the same blanks to him.
Q. Did you send the same blanks to him?

A. I said I had good reason to doubt we sent blanks to him. That seems to be the form used by the company that time.

Q. Have you any reason to doubt this is not one of the blanks you sent to him?

A. No particular reason to doubt it or believe it.

Q. Have no reason to doubt it or believe it?

A. None further than stated.

Q. Does the company ever accept loans without being previously supplied with abstracts of title?

130 A. It is a uniform practice of the company, as far as my knowledge extends, to first note the loan before asking for the abstract. And the cases are very rare where abstracts are furnished without the applications.

Q. My question is, do they ever accept a loan without previously being furnished with a statement or an abstract of title?

A. The executive committee acts upon the propositions for loans represented to them, and is the only body that has power to accept or reject a loan for this company. They accept or reject the loan, and then the party who makes the application is notified of their action, and if the loan has been accepted they furnish abstracts of title for the examination of the company.

Q. Did you ever attend a meeting of the executive committee?

A. I have been in Milwaukee frequently, sir, when they have been in session.

Q. Were you ever present when a transaction of this kind has been gone through with?

A. Yes, sir.

Q. When?

A. Several times, a number of times.

Q. Mention one.

A. During my agency of ten years.

Q. Mention an instance.

A. I can mention half a dozen.

Q. I want you to mention one instance among the number.

131 A. I was in Milwaukee at a certain time, and made application for a loan, myself individually, and was present when the company accepted it. I have been in Milwaukee a great many times with applications for loans, and spoken of them to the executive committee, and had them accepted, and being present when it has been done. I once took up two applications for loans from *the* that were submitted by parties in the city, and was present.

Q. I thought you never attended to applications for loans?

A. I haven't answered any such question.

Q. Haven't you?

A. No, sir.

Q. How do you know this company didn't accept this application for six thousand dollars?

A. We were notified of it by the company.

Q. Is your notification in writing?

A. The company sent Mr. Giddings a notification through our office. We saw that notification.

Q. When did you receive the notification?

A. I cannot state the exact date, because my mind is not fresh upon that subject, but within two days at the furthest after the action of the executive committee.

Q. When was that?

132 A. According to my best recollection it is not far from the first of September. I think a little after.

Q. The first of September; was that in writing?

A. The notification was; yes, sir.

Q. Have you got it in your office?

A. No, sir.

Q. What did you do with it?

A. Sent it forward.

Q. To Mr. Giddings?

A. Yes, sir.

Q. What did it say?

A. It declined his application for a loan of six thousand dollars.

Q. Didn't it accept an application for five?

A. No, sir. It proposed a counter proposition to him for a loan of five thousand dollars.

Q. And you sent such a paper as that to Mr. Giddings?

A. Yes, sir, my own self personally.

Q. Did you send a telegram to Roberts and Hubbard dated September 6, 1872, represented as Exhibit C, attached to Roberts' testimony, which reads as follows:

"Francis Smith and Rockwell loans voted in full. Giddings five thousand. Dean and Payne."

Mr. HORTON. Addressed to whom?

Mr. MILLER. Roberts and Hubbard.

The WITNESS. I have no reason to doubt it, but cannot swear that I did.

133 Q. Did you see the original telegram when Roberts was testifying?

A. I don't remember now whether I did or not.

Q. Was that the first communication you made to them on the subject?

A. I am unable to say.

Q. Did you ever communicate with anybody else on this subject but Roberts & Hubbard?

A. It is not our custom to do business irregularly.

Q. You didn't communicate with anybody but Roberts and Hubbard, did you, with reference to this matter?

A. Our communications were sent to Roberts and Hubbard for the parties' use.

Q. Isn't this the first communication sent to them?

A. I am unable to say, sir.

Q. Have you any reason to suppose it was not the first?

A. It may have been the first and it may not.

Q. Did you on the first write them a letter marked "Exhibit D," and attached to his deposition, and didn't you see that letter on the examination, and doesn't the letter contain the following statement, "Five thousand to Silas Giddings, Warren County, who applied for six thousand"?

A. My recollection is the letter of which that is a copy was written by one of the young men in our office, and signed "Dean & Payne, per W"—per Willie—that was his name.

Q. This don't appear to have been signed so?

134 A. I think you will find the original letter is, if you will look at it.

Q. Suppose it is not signed "per Willie," then who wrote it?

A. If it is the letter I referred to it is signed so.

Q. Did you see that letter when Mr. Roberts was testifying, such a letter as that purporting to be an original document?

A. I think I saw such a letter.

Q. Well, was it genuine?

A. I have no reason to doubt the genuineness of it.

Q. Was it not in your handwriting?

A. No, sir.

Q. Are you sure of that?

A. Very positive.

Q. Was the telegram in your handwriting?

A. I don't remember about that. You examine the original letter I am talking about and see if I am not right.

Q. Did that letter contain this clause, "Five thousand dollars to Silas Giddings, Warren County, who applied for six thousand"?

A. The letter I referred to I think did.

Q. Was that the truth?

A. The truth is as I stated it in the answer to a previous questio n .

Q. On what fact was that statement founded?

A. What do you refer to?

Q. That statement.

A. Founded on the information furnished by the company as far as my recollection goes.

Q. Have you got that information now in your office?

135 A. We received no other information other than what was transmitted to Mr. Giddings. We received no other information from the company other than that transmitted to Mr. Giddings. And the phraseology in that letter is the phraseology of a clerk in the office, and not my individual composition.

Q. Have you got all the communications you received from the company respecting this loan now in your office?

A. We received no other communication from the company respecting this loan, except the communication above referred to, notifying us of the rejection of this six thousand dollar loan, with a counter proposition for a loan of five thousand dollars, which was transmitted to Mr. Giddings, as heretofore stated.

Q. Have you got that in your office?

A. I have stated I sent it to Mr. Giddings.

Q. Do you mean to Giddings or to Messrs. Roberts & Hubbard?

A. Directed through Messrs. Roberts & Hubbard to Mr. Giddings. The communication is addressed to Mr. Giddings, not to Messrs. Roberts & Hubbard. Roberts & Hubbard were not recognized and never have been as loan agents of the company, not by this office or by the company, or by anybody else.

Q. What did you send this letter and telegram to them for, then?

A. It is the easiest way to communicate with the man borrowing the money through the man through whom he sends his application.

136 Q. That is why the telegram and letter is addressed to Roberts & Hubbard, and nothing said about Giddings?

A. Roberts left the application for loan in the office.

Q. And that is why you communicated to him?

A. That is very natural; yes, sir; but the communication embodying the action of the executive committee was addressed to Mr. Silas Giddings.

Q. Have you got a copy of that letter in the office?

A. I have not, sir.

Q. Do you keep copies?

A. Not of communications of that kind.

Q. Did you ever address any other communications except these two to Roberts & Hubbard, one a telegram and the other a letter?

A. We have addressed a great many communications to Roberts & Hubbard respecting their agency.

Q. Respecting this matter?

A. Respecting this particular matter. I have no recollection of anything else.

Q. Didn't you say a moment ago these were the only communications you ever addressed to anybody?

A. I don't think I did. No, sir.

Q. Do you keep copies of letters you send out?

A. We keep copies of the letters we write personally.

Q. Have you got a copy of that letter you sent to Giddings?

A. What letter do you refer to?

Q. You say you sent a letter informing him the six thousand dollar application was rejected?

A. I say I sent the communication from the executive committee or from the company to Mr. Giddings, addressed to Mr. Gidding—to Mr. Silas Giddings; that is what I said.

137 Q. To the care of Roberts & Hubbard?

A. The communication notifying Mr. Giddings of the action of the executive committee was addressed to Mr. Silas Giddings, sr., and enclosed in an envelope addressed to Messrs. Roberts and Hubbard, and mailed to them to be delivered to Mr. Giddings.

Q. Was that after this telegram was sent or before?

A. It was about the same time, sir.

Q. Was it after; was it about the same day?

A. I am unable to state. I presume it was.

Q. On the same day the telegram was sent?

A. I think it was; yes, sir. That is our custom.

Q. Why did you send any telegram to Roberts & Hubbard?

A. Because they were sweating to know what the action of the company was on the propositions they had sent forward for loans, and had probably telegraphed us in this particular case.

Q. If you sent the letter to Giddings enclosing it to Roberts & Hubbard on the day that the telegram was sent to Roberts & Hubbard, why did you take pains the next day to send a letter to Roberts & Hubbard conveying to them information in regard to this Giddings loan?

A. I didn't swear positively that we sent the letter on the same day; I say to my recollection that was the case, because it is our custom in business. The letter you are talking of was written by a young man in the office who has charge of minor correspondence. Messrs. Roberts & Hubbard were constantly writing to this office to know the exact

138 action of the executive committee regarding the loans.

Q. Regarding this loan?

A. Regarding loans or applications which they had presented. It was customary for this clerk to answer the sub-correspondence of little moment, and he probably did that in this case, or he did that in this case because this letter is in his handwriting and signed by him.

Q. Are you sure the letter is in his handwriting and signed by him?

A. Very positive of it.

Q. What is his name?

A. Willie Griggs.

Q. Is he in your office now?

A. He is not.

Q. Where is he?
A. In Minnesota.
Q. Did you know of the letter when it was written; did you see it when it was written?
A. I cannot tell you; very likely not.
Q. Do you recollect whether you did or not?
A. I think I did not, although it might have been signed by me personally.
Q. Was there any other letter besides that?
A. I have stated in my deposition already.
Q. Was this other letter sent before or after this was written?
A. I have answered that question already.
Q. Answer it again.
A. I stated to the best of my recollection I thought the letter containing the notification of the company to Mr. Giddings was sent on or about the same day.

139 Q. You have said it was sent on or about the same day with the telegram. That was sent the day before?

A. Yes, sir.
Q. Then that was before this letter was written, wasn't it, which you say was written by the clerk?
A. I don't think I can answer your question any differently.
Q. Have you still got the correspondence between your office and the home office in regard to this loan, embracing the letters written by you to the company and the letter sent by the company to you?
A. There was no correspondence between our office and the home office regarding this loan at the time the application was sent forward, other than that we wrote a note stating "we herewith enclose"——
Q. I am not asking for the contents; I am asking whether you have got that correspondence or not?
A. "Herewith enclose an application for loan of Silas Giddings," or any other party making such application. Further than that we have no communication regarding the matter.
(Counsel for the plaintiff object to that part of the answer which purports to give the contents of communications from this office to the home office.)
Q. The question is whether you still retain in your office copies of any communication which you sent to the company regarding this loan?

140 A. We retained copies of letters written by this office as a practice; I am unable to state whether we have copies of this particular correspondence or not.

Q. Have you ever looked for this correspondence in your letter-book?
A. I have looked for correspondence regarding this matter.
Q. Have you found any?
A. We have some; yes, sir.
Q. What did you find?
A. I cannot tell you, because I don't remember.
Q. Did you find copies of any letters in your letter-press copy-book, that you sent to the company regarding this loan?
A. I don't remember now as we did.
Q. Do you remember whether you did or not?
A. I think we did not.
Q. If you sent any communication to the company about this loan—respecting this loan—didn't you retain a copy of the communication you sent in your letter-press copy-book?

A. If we sent any communication, the communication is such as I have already stated.

Q. Did you retain a copy of it?

A. We may or may not.

Q. Can you tell whether you did retain a copy of this or not?

A. Of that particular letter, I cannot.

Q. Have you ever looked to see?

A. I have never looked to find a copy of that particular letter of which you are talking.

141 Q. When you transmitted the application to the company in Milwaukee, did you write any letter or communication accompanying that transmission?

A. I have stated the usual form of communication that we wrote in such cases.

Q. Did you in this case?

A. I don't know that we wrote any particular letter other than heretofore stated.

Q. Did you, if you wrote any letter, retain a copy of it?

A. I have answered that question.

Q. Will you answer it again?

A. I have answered it by stating that I think likely we retained a copy of it if we wrote such a letter, but I am unable to swear positively.

Q. Will you look in your letter-press copy-book to ascertain before your deposition is closed whether you did retain a copy of such communication?

A. We will look in our letter-book if requested to do so by parties who have authority to so request us.

Q. We request you before your deposition is closed; now will you do it?

Mr. HORTON. I say you need not furnish your private correspondence between yourself and your principal.

Mr. MILLER. Q. Do you decline to do that; to furnish that copy if you have it?

A. I decline to act otherwise than what I have already stated.

142 Counsel for plaintiff here requests the witness, before the depositionis closed, to furnish a copy of the letter containing the transmission of these applications to the home office.

The WITNESS. I will here state that I feel very positive that no other communication regarding this loan was ever addressed by our office to the company, except the communication accompanying the application.

Q. Have you got a copy of that communication?

A. As to a copy of that communication I have already stated in my deposition.

Q. Did you ever look at the policy issued to Giddings by the company?

(Counsel for the defendant objects to the question because it assumes a policy was issued to Giddings.)

A. I think I have.

Q. Where did you examine it?

(Objected to for the same reason.)

Q. Where was it when you saw it?

(Objected to for the same reason.)

A. Do you mean when I last saw it?

Q. When you first saw it.

A. When I first saw the policy I think it was in our office.

Q. What time was that?
A. I am unable to state the exact time.
Q. About what time? State as near as you can.
A. I think it was in the month of September, 1872.
Q. Who did you receive it from?
143 A. Sent to us from the company, the same as all business of that character was done.
Q. How long was it sent to you after it was accepted by the company?
(Counsel for the defendant objected to the question as assuming its acceptance by the company.)
Q. How long after it was issued by the company?
(Counsel for the defendant objected to the question because it never was issued by the company. It is assuming that is a fact.)
Q. About how long?
A. The contract of the company?
Q. I am not asking you about the contract.
A. The contract of the company——
Mr. MILLER. I object to the contract of the company.
A. I am only stating that to lead me to what you want to know.
Q. I want to know how long it was after the policy was issued by the company.
(Counsel for the defendant objects to the question because it assumes a policy was issued by the company.)
Q. How long after its date was it that you received it?
A. I am unable to state.
Q. How long did it remain in your office?
A. That I cannot tell you.
Q. About how long?
A. It might have been one week; it might have been three weeks.
Q. Wasn't it two months in your office?
A. I should say not.
Q. What did you do with it?
144 A. We returned it to the company.
Q. Didn't you hand it over to the attorneys here?
A. I did not.
Adjourned to Saturday, June 3rd, at 11 o'clock a. m.

SATURDAY, *June 3rd*, 1876.

The cross-examination of John E. Dean was continued by Mr. MILLER as follows:

Q. Did you send the Roberts & Hubbard telegram, dated September 6th, attached to the deposition of Roberts?
A. I am unable to answer the question positively; I think, however, we did.
Q. From whom did you get the facts stated in this telegram?
A. From the company.
Q. How were they communicated to you—by letter or telegram?
A. I think we received no other communication from the company other than communicated in the notification directed from the company to Mr. Giddings, passing through our office.
Q. Do you know how that fact is?
A. I only know it from the custom of the company.
Q. Do you know it from any actual recollection of the circumstances attending this case—the facts attending this case?

A. Refreshing my mind as to the case, I feel very positive there was no other communication than the one referred to. Besides, the custom of the company is——

145 Q. I am not asking you about the custom of the company; I want to know what the facts are in regard to this case.

A. The custom of the company is to communicate the action of the executive committee direct to the applicant in all cases.

Q. Was the communication which you said came to you addressed to Giddings in the form of a letter received through the post office, or was it a telegram sent by the company to you?

A. As before stated, the communication was in the form of a letter from the company, addressed to Silas Giddings, sr., addressed to our office.

Q. You received it, then, from the post-office?

A. We received it as we receive all our mail.

Q. How was it addressed on the outside?

A. The envelope was addressed to Dean & Payne; the letter was addressed to Silas Gidding, sr., with a marginal note forwarded to Dean & Payne.

Q. Was this letter sealed?

A. I have no reason to doubt it.

Q. What did you do with it?

A. We opened the letter—opened the envelope and forwarded the letter addressed to Mr. Giddings to Mr. Giddings.

Q. Did you open a letter addressed to Mr. Giddings?

A. The envelope was not addressed to Mr. Giddings.

Q. I mean the letter which the envelope enclosed, and which was directed sealed to Mr. Giddings. Did you open that letter?

A. The letter addressed to Mr. Giddings was not enclosed in an envelope enclosed in another envelope addressed to us.

146 Q. I understood you to say that this letter addressed to Mr. Giddings was a sealed letter enclosed in a letter addressed to you. Am I correct?

A. You are not.

Q. How was it, then?

A. The letter was dated.

Q. I am not asking you for the contents of the letter. I am asking the manner in which it was addressed.

A. That is what I am coming at. The letter bears date Milwaukee. Commences addressed to Mr. Giddings, sr. Dear sir, etc. This letter was enclosed in an envelope addressed to Dean and Payne.

Q. It was not, then, enclosed in an envelope addressed to Mr. Giddings, was it?

A. The letter was not enclosed in a letter addressed to Mr. Giddings.

Q. Are you sure about that?

A. Quite positive.

Q. Are you as sure of that as anything else you have testified to?

A. I think I am.

Q. And it was from the statements of that letter that you got at facts which you stated in your telegram of September 6th to Roberts & Hubbard, was it?

A. I am unable to answer that question.

Q. You say you received no other communication or information from the home office on this subject, except that contained in the letter addressed to Giddings. Have you not said so?

A. I said so, qualifying it.

Q. Didn't you say substantially that?
A. I did.

Q. Then you must have obtained the facts which you sent in
147 your telegram to Roberts & Hubbard from this letter sent to Giddings, did you not?

A. We doubtless obtained the general information from the letter addressed to Giddings; but didn't copy any portion of the letter in the telegram.

Q. Did you receive any other communication from the home office than the letter you speak of, which was addressed to Giddings, sr.?

A. I think not.

Q. Then all the facts stated in that letter to Roberts & Hubbard were obtained from that letter, were they not?

A. I would like to hear the telegram read.

Mr. MILLER. Counsel for complainant declines to allow the reading of the telegram to the witness until he shall have answered these questions.

Mr. HORTON. That is not so. I am ready to read it now, and now read it:

"CHICAGO, *September 6th*, 1872.

"The Roberts & Hubbard, Francis Smith, and Rockwell loans voted in full. Giddings, five thousand dollars.

"DEAN & PAYNE."

Mr. MILLER:

Q. Now, will you answer this question?

Mr. HORTON. Witness has not refused or declined to answer; but the counsel made the above notes in this deposition without any declination on the part of the witness.

Mr. MILLER:

Q. Will you answer the question last put to you?

A. The letter referred to communicated the fact that the propo-
148 sition made by Mr. Giddings, sr., to the company for the loan of six thousand dollars had been declined, and a counter proposition made by the company to Mr. Giddings to loan him a less amount. From this statement the telegram was probably made up.

Mr. MILLER. The answer of the witness, in which he professes to give the contents of this letter, which he says was addressed to Giddings, is objected to by counsel for complainant as not at all responsive to the question.

Q. When did you receive this letter which you say was addressed to Giddings?

A. I think in the early part of September, 1872.

Q. Can you give the date of the reception?

A. I cannot; but feel positive it was in the early part of September, from the fact that the application for a loan was forwarded to the company about that time, and usually less than a week elapses before the action of the company is communicated to the applicant.

Q. Did you receive any further communication from the company prior to sending to Peyton Roberts the letter of September 7th, which is attached to the deposition of Roberts and marked Exhibit D?

A. Can the letter be read?

Mr. HORTON. Certainly you have a right to see that exhibit before you answer the question.

Mr. MILLER. I decline to read the letter or allow it to be read

149 until you shall have answered this question. Witness can say whether he declines to answer the question.

Mr. HORTON. Witness can say whether he can answer the question without seeing the exhibit.

A. If the letter referred to is the one written by one of our sub-clerks, heretofore referred to, the answer to the question is as follows: That we think we did not receive any communication from the company other than the notice communicating the action of the company to Mr. Giddings, heretofore referred to.

Q. You say Mr. Glenn called at your office; when did he call there?

A. A gentleman called at our office whom I believe to be Mr. Glenn.

Q. Is that what he said his name was, and was he from Monmouth, Illinois?

A. I don't remember what he said his name was; but he said he was from Monmouth, Illinois.

Q. What business did he call to see you about?

A. He called about this Gidding matter.

Q. About what time was this?

A. I am unable to state the time of day.

Q. In what month was it?

A. I don't remember.

Q. Was it in September?

A. I don't remember; but think not.

Q. Was it in October?

A. That I don't remember.

Q. How long after this letter of the 7th of September was written was it?

150 A. I am unable to refresh my mind on that subject.

Q. Cannot you tell within three or four weeks?

A. I cannot.

Q. Was it that fall?

A. My impression is that it was, but I am not positive.

Q. What did Mr. Glenn say when he first came into the office?

A. I cannot give the language he used.

Q. Give the substance of it.

A. He said something about calling to tender money in payment of a premium on a policy of insurance.

Q. A policy of insurance in whose favor?

A. I think it is the policy in question.

Q. Did he say anything about the subject of the policy, Mr. Giddings, being dead at that time?

A. He may have said so.

Q. You don't know, then, whether he did or not?

A. I cannot say positively that I do.

Q. What is your impression as to whether he said anything on the subject or not?

A. My impression is that most of his conversation was confined to the matter of tendering money.

Q. Did you decline to receive the money? I am not asking you for what you said, but did you decline to receive the money?

Mr. HORTON. It is proper for you to state what you said, not to interpret it.

Mr. MILLER. It is not proper for him to state that in answer to this question.

151 Mr. HORTON. I insist it is.

Mr. MILLER:

Q. Did you decline to receive the money?

A. Mr. Glenn may have offered us money. If he did, we declined to receive it.

Q. Do you recollect whether he offered you money or not?

A. I am not clear on that point.

Q. You cannot say, then, whether he did offer you any money or not, can you?

A. I cannot swear positively on that point. My impression is, however, that he offered or proposed to offer money.

Q. Did he offer any paper stating the death—present to you any paper stating the fact of the death of Giddings at that time?

A. Not to my recollection.

Q. You don't recollect whether he did or not?

A. I think he did not.

Q. Do you recollect whether he did or not?

A. I feel very positive that he offered us no papers.

Q. How are you more positive on the subject as to whether he offered you paper than you are upon the subject of whether he offered you money?

A. I don't know as I can give an answer to that question.

Q. You don't recollect distinctly whether he offered you papers or money, or not, do you?

A. I recollect it as clear as I recollect any point in the transaction.

Q. Did he offer you any money?

A. I have stated my impressions in the matter.

152 Q. Did he offer you any paper?

A. I have also answered that question.

Q. You cannot answer it any more definitely than you have answered it, can you?

A. I can state——

Q. Can you answer the question any more definitely than you have answered it?

A. Let me see; I can state that the gentleman whom I believe to be Mr. Glenn came into the office expressing himself as there to tender payment on a certain premium on the policy in question. We had some conversation, somewhat pointed; we of course declining to receive any money. And this, I think, is in substance all that took place.

Q. How long was he there?

A. Five or ten minutes.

Q. Talking all the while?

A. We were both talking.

Q. How many times did he call upon you?

A. Only once.

Q. Are you sure he didn't call but once?

A. Very positive.

Q. Did you make any memoranda of what he said to you at that time?

A. We were surprized at any demand of this kind being made on the part of the representatives of Mr. Giddings that our mind was quite vividly impressed at the time with the circumstances.

Q. The question is did you make any memoranda of what transpired between you and Mr. Glenn at that time—any written memoranda?

153 A. No written memoranda.

Q. Did you communicate the fact of that interview or the substance of it to the company subsequently?

A. Not immediately after.

Q. Did you at any time afterwards?

A. We did communicate to the company.

Q. I am not asking for the communication itself, but whether you communicated it?

A. I am going to say we did communicate to the company the substance of the interview, or the fact that they were attempting to make a claim on the company.

Q. Did you preserve a copy of the letter that you wrote to the company?

A. I am not positive whether we wrote or communicated it to one of the officers while passing through the city and stopping at our office.

Q. Have you looked through your letter-book to see what communications you made to the company?

A. On this particular point we have not.

Q. On any point?

A. What point do you refer to?

Q. Any point touching this case.

A. We have looked up the facts in this case.

Q. Have you made any communication to the company? Have you looked in your letter-book to see if you made any communication to the company or not?

A. If recently, no.

Q. During the months of September or October, when this application for a policy was made?

A. I have seen no letter written by our office to the company.

154 Q. Have you seen a copy of any letter written by your office to the company?

A. I have not.

Q. Have you looked for any?

A. Not specially.

Q. Have you at all?

A. I do not think we looked specially as to this point.

Q. Have you in regard to any point involved in this case?

A. Not other than in a general way.

Q. Have you at all?

A. We have.

Q. How many letters did you find that you have copies of?

Mr. HORTON. You need not answer that question unless you see fit.

Mr. MILLER. I insist upon an answer to it.

Q. Written during the months of September or October. Will you answer the question?

A. I don't remember of any.

Q. Do you say you have not copies of any letters written to the company by your office during the months of September or October?

A. I cannot say that we have or have not positively.

Q. Have you looked for any?

A. Not specially.

Q. Have you at all?

A. Unless you call looking up the points in this case.

Q. Have you looked for any letters written during those months?

A. Only in a general way.

Q. Did you find any?

155 A. None addressed to the company.

Q. Who were they addressed to?

A. They would not be addressed to any one except the company.

Q. Did you find any letters, the question is, addressed to any of the officers of the company?

A. I do not remember of any.

Q. Can you say you did not find any such?

A. I can say we did not find any such.

Q. Will you present your letter-book to the commissioner for examination on that point?

Mr. HORTON. You need not do so; it is your private correspondence that parties are not entitled to.

Mr. MILLER. The request is made. You can say whether you grant it or not.

A. If advised by counsel to do so, we will.

Mr. HORTON. Counsel advises you. You are not bound to furnish these gentlemen with your private correspondence at all, and they have no business to inspect your private correspondence.

A. I feel very positive, however, that there are no letters of the kind referred to.

Q. Will you produce your letter-press copy-book for the purpose of having the fact ascertained whether you did or not address any letters to the company during the months of September or October?

A. We certainly addressed no letters to the company putting them on guard or advising them particularly as to this case, and no par-
156 ticular letters, other than in a general way and general correspondence such as we would write in any business transaction.

Q. Will you furnish your letter-press copy-book for the purpose indicated?

A. As before stated, we will.

Q. What do you mean "as before stated"?

A. If advised to do so by counsel.

Q. And not without? Is that what you mean?

A. I think that is what I mean.

Q. Did you keep a copy of this letter addressed to Roberts and Hubbard, dated the 7th of September, and attached to the deposition of Roberts?

A. If the letter referred to is the one written by one of our sub-clerks who signed "per Willie," or "per G.," I am unable to state whether we did or not.

Q. Have you looked to see?

A. Not to find the copy of this particular letter.

Q. You cannot say, then, whether you kept a copy of that letter or not?

A. I cannot now.

Q. Wasn't it your custom to preserve copies of all business letters issued from your office?

A. That is the custom of our office.

Q. It was the custom at this time, wasn't it?

A. I think it was.

Q. You don't know whether a copy of this letter was preserved or not?

A. Not this particular letter.

Redirect examination by Mr. HORTON:

157 Q. Mr. Dean, did Mr. Glenn, or the gentleman whom you say

you supposed to be Mr. Glenn, furnish to you any proof of death of Mr. Giddings, sr.?

(Counsel for the complainant objected to the question, because the witness has testified on that subject in his direct examination, and on the ground that the question is leading.)

A. He did not.

Q. Did he furnish to you any papers in this matter? If so, what?

(Counsel for the complainant objected to the question for the reasons given above.)

A. He furnished us no papers in the matter.

Q. State whether or not it was known or understood in the conversation that you have referred to in your cross-examination between yourself and Mr. Glenn, as to whether Mr. Giddings, sr., was at that time dead.

A. I think we understood that Mr. Giddings was dead.

Recross-examination by Mr. MILLER:

Q. I wish to put a question to the witness in relation to a subject I forgot when he was under cross-examination to ask him about. You say that you saw a policy issued by the company upon the life of Mr. Giddings, and that it was for a time in your office in Chicago. Is the paper now handed to you, marked Defendant's Exhibit 1, the policy referred to?

158 Mr. HORTON. That part of this question which assumes that a policy was issued is objected to, as it never was issued by the company.

Mr. MILLER:

Q. Is that the paper you refer to?

A. My impression is that this is the paper referred to, but this policy has never been countersigned or put in force by the company, and it is invariably the rule of the company to require payment of premium before countersigning—before putting the policy in force.

(Counsel for the complainant objected to the last part of the answer as not responsive to the question.)

Q. The simple question is as to whether that is the paper to which you have alluded. Will you say whether it is or not?

A. I think it is, as before stated.

Q. Have you any doubt about it?

A. No reasonable doubt.

Q. Have you an unreasonable doubt about it, or anything you can construe into a doubt?

A. I think not.

Q. When did you receive that paper?

A. If that is the paper, we received shortly after its date.

Q. How long after its date?

A. Perhaps within two or three days.

Q. How long did you keep it in your office?

A. I cannot answer that question definitely.

Q. About how long?

A. It was kept as policies are usually kept under the rules of the company.

Q. The question is how long have you kept it?

159 Mr. HORTON. He has answered he cannot say.

Mr. MILLER:

Q. About how long did you keep it?

A. I refer for my answer to the statements of the company in this case.

Q. Will you state now your recollection of about how long you kept this policy in your office?

A. I cannot state any more definitely than already answered.

Q. You have not stated at all yet.

A. I have referred to the company's testimony in the case.

Q. What testimony do you refer to?

A. Not testimony I do not mean particularly, but papers in the case which I think show the facts you are alluding to.

Q. I am now asking your recollection for the purpose of testing it. How long did you keep this policy in your office?

A. My impression is it was sent back to the company the last of September or October.

Q. What time in October?

A. Not far from the first part of October, I think. This is altogether my recollection.

Q. Did you send any communication to the company with it when you enclosed the policy back to it?

A. Not other than the report made by the agency to the company of all business done at that time.

Q. Did you send any communication to the company when you enclosed this policy back to it?

160 A. No special communication.

Q. And you don't know now when you did enclose it?

A. I know it was enclosed and returned in the regular report to the company.

Q. Wasn't this policy in your office on the first of November, and wasn't it returned to the company the 20th of November?

A. If the reports to the company show that it was, it was.

Q. Have you any recollection on that subject?

A. No further than as stated.

Q. Then you don't recollect—have no recollection of the fact, and the circumstances attending it, of your returning this policy to the company, have you?

A. I have a recollection of what I have stated.

Q. Do you now recall the fact as distinctly within your recollection of your having returned this policy to the company?

A. I know that the policy was returned to the company in a regular report to the company.

Q. Do you recollect that?

A. Yes, sir.

Q. That fact that this policy was returned?

A. Yes, sir.

Q. Did you personally supervise it?

A. It was done under my personal supervision.

Q. Did you see the policy before it was enclosed back to the

161 company, so as to enable you to state that it was thus enclosed?

A. I saw the report that was made to the company and the vouchers inclosed.

Q. Do you know when that report was dated?

A. Not other than as stated.

Q. You cannot state whether it was dated in October or November, can you?

A. I stated I thought the last of September or the early part of October; but the date of the report is the time the transaction took place.

Mr. HORTON:

Q. Was this policy ever issued?

(Objected to.)

A. It was not; no, sir.

Q. Any premium ever received for it?

A. There was not; no, sir.

After reading deposition, witness wishes to correct the last answer on page 85, by inserting in place of the words "although it might have been" the words, "otherwise it would have been."

JOHN E. DEAN.

Subscribed and sworn to before me this fifteenth day of June, A. D. 1876.

[SEAL.] JOHN GRAY,
Notary Public.

162 Deposition of TRUMAN H. DAY, taken before John Gray, notary public, on the 15th day of June, A. D. 1876, at Chicago, Cook County, Illinois, on behalf of the defendant.

Direct examination by Mr. HORTON:

Q. What is your name, age, residence, and occupation?

A. My name is Truman H. Day; age, thirty-six; residence, Aurora, Illinois; occupation, cashier and bookkeeper for Dean and Payne.

Q. Are Dean and Payne the general agents for any life insurance company; if so, what?

A. They are; the Northwestern Mutual Life Insurance Company, of Milwaukee.

Q. How long have you been with them as such cashier and bookkeeper?

A. Between four and five years.

Q. Did you ever see Mr. Peyton Roberts in Dean and Payne's office?

A. I have.

Q. When was the first time?

A. I think it was in August, 1872.

Q. State whether or not you saw him there more than once during that month.

A. I saw him but one day; he was out and in the office during that time.

Q. Do you remember what day that was?

A. I do not; no, sir.

Q. Did you hear any conversation between Mr. Roberts and either Mr. Dean & Payne?

163 A. I did; yes, sir.

Q. With which one, Dean or Payne?

A. Mr. Payne; Mr. Dean was out of town at that time.

Q. Did you hear any conversation between them in regard to an application for insurance or an application for a loan of money by a man of the name of Giddings?

A. I heard conversation in regard to loans and insurance, also had a conversation with Mr. Roberts myself.

Q. That day?

A. That day; being personally acquainted with him before he came to the office.

Q. Did Mr. Roberts leave any applications there that day?

A. He did.

Q. What was the conversation so far as it relates to the Giddings matter which you heard between Mr. Payne and Mr. Roberts that day?

A. I don't know that I particularly remember, but I remember that Mr. Roberts came in; Mr. Payne was out; he presented some applications for loans and insurance. I talked with him a short time; said to him Mr. Payne would be in shortly; soon after Mr. Payne came in. I called his attention to Mr. Roberts, and said to him he had brought in some business for us. Mr. Payne and Mr. Roberts, after a short conversation between ourselves on general topics, went to talking more on this business; I was writing at my desk, or busy at my desk; Mr. Payne's desk was some ten or twelve feet from me, I should judge;
164 he was sitting either there or on the lounge near there, talking with Mr. Roberts, and in the conversation, in which I remember I joined somewhat myself, something was spoke' about the insurance in connection with these loans, and the question was asked Mr. Roberts if the loans were not granted if the insurance would be taken; he said it would not, they were all based upon loans; if the loans were not granted the insurance would not be taken. Mr. Payne was talking also in regard to the valuation of some property there, saying it was a little doubtful about the whole amount being granted.

Q. The whole amount of what?

A. Of the loan asked for, and wanted to know if a smaller amount would not answer, and Mr. Roberts' reply was that they could not get along with anything less than the amount asked for; if a loan was not granted for that amount it would not be taken, or something to that effect. That is as I recollect it now.

Q. In any separate conversation which you had—you spoke of having one with Roberts—was anything said about this Giddings matter specially?

A. There was not; no, sir. I know at the time Mr. Roberts made this expression, that the insurance would not be taken if the loan was not granted. I asked him if he could not send us up some insurance separate from the loans, and he replied he thought perhaps he might do so after a while.

Q. Was there any such conversation as this in your hearing, "I"
165 meaning Mr. Roberts, "also told them," meaning Dean & Payne, "that I had said to Mr. Giddings that I thought five thousand dollars would be all the company would agree to loan on the security, and that he had said that the same would be satisfactory to him in the event of the company objecting to loaning more"?

A. No, sir; there was not.

Q. State whether or not there was any abstract of title with the Giddings application?

A. There was none, to my remembrance.

Cross-examination by MR. MILLER:

Q. Are you still in the employ of the company?

A. I am in the employ of Dean & Payne.

Q. In what capacity?

A. Cashier and bookkeeper.

Q. In what capacity was you in their employ at this time?

A. Cashier and bookkeeper.

Q. Have you read the deposition of Peyton Roberts since he gave it?

A. I have not; no, sir.

Q. Has it been read to you?

A. No, sir.

Q. Have you read the deposition of Mr. Payne since he gave it?

A. I wish to correct that answer; I have read some. I was thinking of something else. I have read part of Peyton Roberts'; that is, just glanced over it, not read it all.

166 Q. When did you do that?

A. I think it was about two weeks ago; about two weeks ago.

Q. How did you happen to read it?

A. It was left in the office or brought down to the office by somebody. I picked it up to read it myself.

Q. Have you read the deposition of Mr. Payne since he gave it?

A. Yes, sir; I have.

Q. When did you read that?

A. Since he gave that. I cannot tell you within a week.

Q. How did you happen to read that?

A. A young gentleman brought it down to the office to leave it for Mr. Dean, and laid it upon my desk, or rather I took it, Mr. Dean being out.

Q. Wasn't it brought there for you to read?

A. No, sir; not that I know of; nothing of that kind said to me at all and no one ever asked me to read it.

Q. You found it lying on your desk?

A. It was handed to me and I laid it upon the desk, and not having much of anything to do, I looked over it.

Q. Did you read it all through?

A. No, not fully through. I glanced through the whole of it. I didn't read it all through, to sit down and read so as I would see everything that was written in it. I glanced over it.

Q. Have you read it on any other occasion?

A. I have not; no, sir. I perhaps had it on my desk before Mr.

167 Dean came in an hour, and I was busy more or less of the time. I glanced at it one or two times and I saw Mr. Payne looking at it afterwards and speaking of some correction he wished to make and took it, and came up here and made it, I believe.

Q. Has he made any correction to his deposition since he gave it?

A. I think that he has. He spoke of doing it.

Q. Has Mr. Dean had a conversation with you, in which he called your attention to the interview with Roberts when he presented these applications?

A. No more so than he has with business in general in the office.

Q. Has he in any particular instance called your attention to that interview?

A. No, sir.

Q. At no time?

A. We have spoken of it. He has not called my attention to it.

Q. When did you speak of it?

A. I don't know as I can tell you. We spoke of it as we speak of other business.

Q. Do you recollect of any in which you spoke of it?

A. At the interview between——

Q. Roberts and Payne at the time he left the applications there?

A. Mr. Dean has but little, if any, conversation; and I don't remember that he has ever referred to that time to me now, at all.

168 Q. Have you ever had any conversation with Mr. Payne?

A. Mr. Payne or Mr. Dean.

Q. I mean Payne. Have you ever had any conversation with Mr. Payne in which the interview between and Roberts, when the ap-

plications were presented by Roberts, were alluded to; that particular conversation?

A. Yes, sir.

Q. When?

A. Since he has testified here.

Q. Previous to his testifying?

A. Nothing of any consequence; no, sir.

Q. Did you ever have any such interview?

A. We have talked it over; I have said nothing of any consequence.

Q. Did you ever have such an interview?

A. What kind of an interview do you mean?

Q. In which his conversation between Roberts and Payne, when the applications were left for transmission to the company, were alluded to?

A. Yes, sir.

Q. When did you have such a conversation?

A. I can not tell you now, I don't remember; I know that we have spoken of it, as we have of business in general.

Q. Spoken of that particular interview?

A. Spoken of Mr. Roberts coming to the office with these applications.

Q. What Mr. Roberts said when he presented them?

A. No, sir; I don't know that we have ever referred particularly to that at all.

169 Q. Do you mean to say you and Mr. Payne in your conversations with each other have never referred to what Mr. Roberts said when he presented those applications?

A. Well, I mean to say we have never compared notes at all to see if we understood it alike; I don't know what you want to know, but that is what I mean.

Q. Have you ever had any conversation with each other in which that matter was called up.

A. Yes, sir.

Q. When?

A. I cannot tell you; just as we do business transactions that occur every day.

Q. You don't recollect of any instance?

A. I don't recollect of any particular instance; we had no particular conversation any more than we have on business in general that transpires in the office.

Q. Did Mr. Payne ever tell you what Mr. Roberts said on that occasion?

A. No, sir.

Q. Never told you what his recollection was of what Mr. Roberts said on that occasion?

A. He told me after his deposition was made.

Q. I mean prior to his deposition?

A. He may or he may not; if he has I don't remember it; there has been, as I have told you, no particular conversation in regard to that subject.

Q. Did he on one occasion state his recollection of that conversation?

A. Not that I remember of.

170 Q. And did you in reply say "I did not pay much attention to it, for I was writing during the time"?

A. Mr. Payne talked to me at one time; I don't know but he may have asked me that question, and I know that I said to him that I was very busy at the time Mr. Roberts was in there, and I didn't pay so much

attention to the general run of the conversation; he was talking over matters entirely foreign to this business and I was not listening to the whole of the conversation for I was busy at my desk.

Q. Did he ever say to you what he recollected Mr. Roberts said at the time these obligations were made?

A. Not that I remember.

Q. And did you reply that you did not pay much attention to that conversation, for you was writing?

A. Not that I remember of, but might have done so.

Q. And you didn't recollect what he did say; did you say that in reply to his statement of his recollection of what Mr. Roberts said?

A. I don't recollect of any such conversation now, sir.

Q. If Mr. Payne has testified to that in his deposition, is it true?

A. If Mr. Payne has testified to that I presume it is true; I have no reason to doubt it, but I have no remembrance of hearing anything of that kind, yet I may have done so; this matter is something I
171 have not charged my mind with, being not particularly interested in it, it being out of my department particularly, and the most I remember is the mere general facts as they come along in the case.

Q. You were writing during the time that Mr. Roberts was there talking with Mr. Payne, were you?

A. Some of the time.

Q. Most of the time, were you not?

A. Not all of the time, for I had charge of the office; frequently had to get up to take premiums, collect premiums; I was attending to the business in the office.

Q. During the time Mr. Roberts was there?

A. Yes, sir.

Q. And your attention was being given to this business that was immediately under your observation, wasn't it?

A. Part of the time, part of the time not; I was talking with them some of the time.

Q. Do you recollect anything you said to them?

A. Yes, sir.

Q. If Mr. Payne has testified in the deposition that you did not take part in the conversation that is true, is it not?

A. No, sir; it is not true if he has testified to that.

Q. How long were they there together?

A. I could not tell you as to that; I think Mr. Roberts was in the office altogether an hour or two, perhaps it might have been more.

172 Q. You say you have talked with Mr. Payne about this since he gave his deposition?

A. Yes, sir.

Q. How many times?

A. I don't know as I can remember well; talked about it. He has asked me once or twice, or something has been said about our depositions. I said to him I guess this morning coming in, I didn't know but they would take our depositions to-day. There has been some such conversation as that referred to several times.

Q. Have you talked with him with reference to what Mr. Roberts said when he made these applications?

A. No, sir; since his deposition?

Q. Yes.

A. No, sir.

Q. Haven't you already said you talked with him since his deposition

in reference to what Mr. Roberts said, but didn't talk with him before he gave his deposition?

A. I haven't either understood your question or you didn't understand me. I say I have talked with Mr. Payne in regard to his deposition some since his making his deposition.

Q. When did you talk with him upon that subject?

A. I think we had some conversation on the afternoon he came back from making his deposition.

Q. What did you say then?

A. I don't remember what was said distinctly; nothing of any consequence.

173 Q. What did he say?

A. He said it was the first time he was ever on the witness stand and he thought the counsel asked him some foolish questions.

Q. Is that all he said?

A. He seemed to feel worse over that than over anything else.

Q. He seemed to have sympathy for the counsel, is that it?

A. He didn't have a great deal of sympathy for him, I think.

Q. Didn't he in that conversation allude to what Roberts said when he brought in the application?

A. I don't particularly remember what he did say. It is something I didn't charge my mind with; it was nothing that particularly concerned me. I had my own remembrance about it.

Q. You cannot remember whether he did or did not?

A. I remember we talked over this conversation, his giving his deposition, and he was talking with Mr. Dean about it somewhat. I was present also at the time, and Mr. Payne said he distinctly remembered of Mr. Roberts coming into the office at that time, and some such conversation as that.

Q. What did he say?

A. I could not repeat it.

Q. Did he tell you what Roberts said when he came into the office with those applications?

A. It was a general conversation, and he might have done so and he might not.

Q. You cannot recollect whether he did or not?

174 A. It is something I didn't think much of, and he might and might not.

Q. You cannot tell whether he did or not?

A. He might and might not.

Q. Can you tell whether he did or did not?

A. I say he might and might not. That is my answer.

Q. Can you say whether he did or did not?

A. I can say he might or might not.

Q. Will you answer that question definite?

A. I cannot answer it any better than I have.

Q. Is your recollection any more distinct about a conversation that took place three years ago than it is about a conversation that took place three days ago?

A. This conversation that was had was not particularly with me. I was in the office, and it was talking with Mr. Dean after he came back, and I didn't think it was of any importance. I cared nothing about it any way. This other conversation that took place three years ago, what I have testified to I remember distinctly, just the main points of it.

Q. You didn't hear it all—all the conversation that took place three years ago?

A. No, sir, I did not; that is, I say no, sir. I don't know whether I heard it all or not. Mr. Payne and Mr. Roberts went out after they came in the office.

Q. You didn't hear all the conversation that took place there in the office, did you?

A. All of the conversation that took place in the office I heard,
175 for our desks were no further apart than Mr. Dean and myself here, ten or twelve feet, I guess. I was busy more or less of the time.

Q. Didn't you tell Mr. Payne a short time ago, before he gave his deposition, that you was writing and didn't pay attention to that conversation, at least within four or five weeks prior to that time, when he stated to you this conversation that took place between himself and Roberts, that you during that time was paying attention to your business and didn't pay much attention to this conversation?

A. I think I did; yes, sir.

Q. Was that true?

A. That is; yes, sir; that is, I was not paying much attention to it. I was not paying any particular attention to that. I was listening to the general run of the conversation as one would come into the office talking about business. I didn't give my particular attention to that business.

Q. When was your attention first called to that conversation between Payne & Roberts after it took place?

A. I think my recollection of it is after we heard of Mr. Giddings' death, that there was something said.

Q. About that conversation?

A. About the conversation, yes, sir.

Q. Who was it said between?

A. I have talked with Mr. Payne about it a very little, not but a very little, for Mr. Payne has been in the country most of the time.

176 Q. I am speaking now with reference to Mr. Payne. Did you talk with Mr. Payne about it at that time?

A. At which time?

Q. You say at the time it was understood they were going to make a claim for this policy?

A. No, sir; I said after we heard that Mr. Giddings was dead.

Q. Did you talk with Mr. Payne about it?

A. I said I did not.

Q. Have you talked with him since about it?

A. Yes, sir.

Q. When?

A. I cannot tell you exactly when.

Q. Can you fix any time when you talked with him?

A. I have talked with him about it some since we heard that these depositions were going to be taken.

Q. When did you first speak to him about it?

A. I could not tell you the day.

Q. Was it within the last four weeks?

A. I think it was—yes, sir; Mr. Dean said our depositions would be taken.

Q. On more than one occasion did you talk to him about it?

A. It has been spoken of several times between us—that is, merely brought up and spoken of. There has been no general conversation in

regard to the subject between us. We have had no general conversation on it whatever.

TRUMAN H. DAY.

177 *Deposition of Willard Merrill.*

Deposition of Willard Merrill, taken before Francis Bloodgood, special examiner, at Milwaukee, June 10, 1876.

Q. What is your name, age, and residence?
A. Willard Merrill; 45 years old; reside in Milwaukee, Wis.
Q. What is your occupation?
A. I am secretary of the Northwestern Mutual Life Insurance Company.
Q. How long have you been secretary?
A. Since the last of January, 1873. I don't remember the exact date.
Q. What officer of the co. has charge of the policy department?
A. The secretary.
Q. Do you know of an application having been made by Silas Giddings, sen., for a policy of insurance in the co.?
A. The records show that an application was made by him.
Q. Where do the records of the office shew that this application was made?
A. The application is dated 30th of July, 1872.
Q. Do the records of the office shew whether that application was acted upon by the co.?
A. They do.
Q. At what date?
A. The policy was issued from the home office on the 24th of August, 1872—from the home office in Milwaukee.

178 Q. What do you mean by the policy being issued?
A. I mean that the medical examiner accepted the application, the policy was filled in the usual form, signed by the secretary, and sent to the State agent at Chicago, Ill.
Q. Signed by nobody else but the secretary?
A. Not at the office.
Q. Was not signed by the president?
A. Oh, yes; I beg your pardon; his name is printed on it, so I didn't think of it.
Q. What do the books of the co. show in reference to this application and the policy?
A. I have a copy of the entries upon our register.
Counsel for defendant offers in evidence the statement which is hereto attached, marked Exhibit A.
Q. Explain this statement.
A. First. The figures 24 mean the day of the month, and the top of the page containing the statement is August, 1872. The first "do." shows that the policy upon the register next above this was upon a man having the same post-office address, and that was Cameron, Ill's. In the next column are four "do's" corresponding with the statement in the first policy above that; first, being Monmouth; second, Ill's; third,

179 Dean and Payne; fourth, Roberts and Hubbard; Dean and Payne being State agents for this co. for the State of Ill's, and Roberts and Hubbard are local agents at Monmouth, Ill. November 8th, 1816, is the date of the birth of Mr. Giddings, as given in

his application. In the next column, 56 shows the age; in the next, 68909 is the number of the policy; in the next column, "non-p'ng L" and "6,000" shows that it is a non-participating policy for $6,000.00 on the continued life plan; next, the letter "A" shows that the premium is paid annually in advance; the next, $302.52, shows the amount of the annual premium; the next, letter R, shows that the policy was returned, never having been delivered to Mr. Giddings. This "C'd Oct., 1872, N T, means that the policy was cancelled Oct., '72, because it was not taken. Then there is a memorandum—the original policy sent to Hoyne, Horton and Hoyne, Jan. 10th, '74. J. N. P. shows that the policy was sent to our counsel in Chicago, and is a memorandum made by a clerk of the loss department, Mr. Proeschel.

Q. Then this statement shows all that the books of the co. show in reference to the application and the policy?

A. Well, everything that I can find except this, that a bill was made and copied on the policy-books billing this policy to the
180 State agents, Dean and Payne. We do not write letters. When we send our policies we mail a bill instead. There is no letter in regard to it.

Q. When does that bill say the policy was sent?

A. Well, immediately after the date. I have not got it here. I thought I had a copy of the bill here.

Q. Look at this paper and state if it is the original policy.

A. That is the original policy.

The commissioner marks the policy referred to as Exhibit B, but not to be attached to the deposition to be produced on trial.

Q. Can you tell when this policy was returned to the co., and by whom, if at all?

A. A letter from our agents written on the second of October, 1872, states the return of this policy to us.

Counsel for the defendant offers in evidence the paper hereto attached, marked Exhibit C.

Q. Have you the original application for this policy?

A. We have at the office. I did not bring that with me because it is in a volume with four hundred. This is a copy, and I have compared it.

Counsel for defendant offers the copy of the application that is hereto attached, and marked Exhibit D.

Q. Can you state what, if any, provision is contained in the
181 policies of the co. in reference to the time or condition on which they shall become binding on the co.?

A. I cannot, except as the language appears here. It is the seventh provision of policies, in this language: "This policy shall not take effect and become binding on the co. until the premium shall be actually paid during the lifetime of the person whose life is insured, and to some person authorized to receive it, who shall countersign the policy." This is the usual provision. There may be different provisions in different policies—in different forms of policies. The provisions are substantially, if not precisely, the same in all our policies.

Q. Have you a certified copy of the charter of the co.?

A. I have.

Counsel for def't offers the certified copy of the charter, which is hereto attached and marked Exhibit E.

By Mr. MILLER:

Q. When was this application for insurance accepted by the co.; do the books show? If so, please state.

A. Well, I cannot say what date it was, except that the books kept by the medical examiner will show. It must have been before or on the date of the policy. Dr. McKnight is the medical examiner of the office. His books will show.

182 Q. The application was regularly accepted by the co., was it not?

A. Yes, sir.

WILLARD MERRILL.

184 *Deposition of W. H. Farnam.*

Deposition of W. H. Farnam, taken before Francis Bloodgood, special examiner, at Milwaukee, June 10, 1876.

Q. State your name, age, and residence.

A. William H. Farnam; age, 34; residence, Milwaukee, Wis.

Q. What is your occupation?

A. I am assistant cashier of N. W. Mutual Life Insurance Co.

Q. What was your occupation during 1872?

A. The same.

Q. How long have you occupied that position?

A. Some seven or eight years.

Q. What is your principal business as assistant cashier?

A. I have charge of the loan department of the co., under direction of the president.

Q. Personal charge?

A. Personal charge, under direction of the president, and act as secretary of the executive committee.

Q. Do you recollect the circumstance of an application being made for a loan by Silas Giddings, sen., in 1872?

A. I have no particular recollection of it.

Q. Do the books of the executive committee, of which you are secretary, show anything about it?

A. They do.

Q. Have you that book here?

A. I have the records and minutes of the executive committee.

184 Q. Turn to the record which shows anything in reference to this application.

A. This record shows that at a meeting of the executive committee, held at this office on the 4th day of September, 1872, at seven o'clock p. m., they voted a loan of five thousand dollars for five years, at ten per cent., to Silas Giddings, sen., on 154 acres of land, in Warren Co., Ill., described in his application dated July 30th, 1872, and on file in this office.

Q. Have you given the language in reference to the application which is used in the record?

A. I have given the exact language of the entry.

Q. State whether or not that is all that the records of the executive committee show in reference to that application.

A. It is.

Q. Have you any means of knowing at what stage of that meeting or at what time in the evening that resolution was adopted or action taken?

A. I have not, except this: It is usual at these meetings to act on the loan applications after disposing of all the special business; that is, at the latter part of the meeting.

Q. Look at that paper and state whether that is the original application for the loan.

185 A. It is.

Application is marked by the commissioner Exhibit F, not to be attached, but to be produced on trial.

STATEMENT.—This is the application referred to in this entry.

Q. State whether or not there was any other or further communication between the co. and Mr. Giddings in reference to this application.

A. There was not.

Q. Have you a copy of the by-laws relating to the loaning of money by the co.?

A. I have.

Q. What sections of the by-laws relate to that subject?

A. There are two sections—Nos. 14 and 19.

Q. State whether the two printed leaves shown you were taken from the printed volume of by-laws, and embrace the two sections you have named, and whether they embrace everything in the by-laws on that subject.

A. They do.

The printed leaves referred to are offered in evidence by the counsel for defendant, and are hereto attached, marked Exhibit G.

Q. State whether or not any abstract or evidence of title was furnished the co. by Mr. Giddings upon making this application, or at any other time.

186 A. I do not find that any abstract was ever received.

Q. Is it usual that abstracts should accompany the application for a loan?

A. The Co. never require it; they sometimes do.

Q. It is not usual?

A. No; we always advise to the contrary.

Q. What is the regular rule of the Co. in reference to the payment of loans? that is, how is the money paid to the borrower?

A. It is paid to the borrower by a bank draft, payable to his order after he has perfected his securities to the satisfaction of our counsel, and they are accepted by the president, and everything else in relation to the matter is satisfactory; all the loans are voted on these conditions.

Q. To whom are all applications for loans presented, and by whom are the applications acted upon?

A. The executive committee vote all the loans, and the applications are presented to them; no one else has any authority to make the loans.

Cross-examination:

Q. The loan department and the insurance departments in this Co. are entirely separate and distinct departments, are they?

A. They are entirely.

Q. Does the secretary of the insurance department, and those who have special care of that department, participate at all in the

187 management of the loan department?

A. Not at all; and have no knowledge of the transactions in the loan department.

Q. To whom, if any one, did you communicate this action of the executive committee in voting this loan of five thousand dollars, and when was that communication made?

A. We communicated this action to Dean and Payne, the Co.'s insurance agents for Chicago, Ill's.

Q. Have you a copy of that communication?

A. I have.

Statement.—It is a copy except the printed heading.

Q. Did you make a communication of this fact to any other person except Dean and Payne.

A. No, sir; did not.

Q. No other person, then, received any communication from the home office except Dean and Payne?

A. No, sir; these books show everything that was done by us.

Redirect examination:

Q. What has been the custom for the past several years in reference to giving notice of the action of the executive committee on loans?

A. At or about the beginning of 1873 we commenced using and have since used a printed notice which we direct to the applicant for
188 the loan and forward to him through the hands of the party who sends us the application. Sometimes it is one of our insurance agents and sometimes it is not.

WM. H. FARNHAM.

189 *Deposition of J. N. Proeschel.*

Deposition of J. N. PROESCHEL, taken before Francis Bloodgood, special examiner, at Milwaukee, June 10, 1876.

Q. State your name, age, and residence.

A. J. N. Proeschel; age, 41; residence, Milwaukee.

Q. What is your occupation?

A. I am adjuster of claims for the N. W. Mutual Life Ins. Co.

Q. How long have you held that position?

A. Since the latter part of 1872.

Q. Do the records of your office show anything in regard to the death of Silas Giddings, sen., of Illinois?

A. It shows something; in regard to the proof of death, I have what purports to be the affidavit of a physician, from which affidavit I could not decide whether he was the attending physician or not at the time of the death, and of a farmer who claims to have been present at the death of Silas Giddings.

Q. Have you those affidavits?

A. I have.

Q. Look at these papers and state whether they are the affidavits you have mentioned.

A. They are.

Defendant's counsel offers the affidavits in evidence, and they are hereto attached, marked Exhibit H.

Q. Do the records of your department show any other evidence of the death of Mr. Giddings?

190 A. None whatever.

Cross-examination:

Q. From whom did you receive these affidavits, and when did you receive them?

A. I could not tell you the date. They were received by the home office, but I could not tell the precise date.

Q. From whom did they come?

A. They came from our agents, Dean and Payne, undoubtedly.

Redirect examination:

Q. Do you know anything about as to whom they came from personally?

A. I have no personal knowledge of it.

Recross-examination:

Q. What reason have you to suppose that they came from Dean and Payne, your general agents in Chicago?

A. The reason is a letter which I have from our agents from which it would appear that it was the first time the matter was mentioned to us. These papers when received would not come directly into my hands, they not being concerning a claim.

Q. State whether proofs of death occurring within the territory of your agents in Chicago come from that office to the home office.

A. They do, with the exception, of course, of parties sending of their own accord.

Q. There are exceptions, of course?

A. There are a few only.

J. N. PROESCHEL.

191 *Testimony of George W. Young.*

Testimony of GEORGE W. YOUNG, taken before Francis Bloodgood, special examiner, June 10, A. D. 1876.

Q. State your name, age, and residence.

A. Name, Geo. W. Young; age, 28; residence, Milwaukee.

Q. What is your occupation?

A. Clerk.

Q. Clerk for whom?

A. Northwestern Mut. Life. I suppose my occupation should be stated policy clerk.

Q. How long have you held that place?

A. Six years.

Q. What has been the custom of the co. during that time on issuing policies of insurance in reference to keeping copies of them?

A. It has been the custom of the co. to keep a copy of each policy since June 1st, 1871.

Q. Look at this policy marked "Exhibit B" running to Silas Giddings, sen. Was there a copy kept of that policy at the time it was signed by the secretary?

A. Yes, sir.

Q. Look at this paper and state whether that is a copy of it.

A. Yes, sir; that is a copy of that policy.

Defendant's counsel offers the copy in evidence, which is hereto attached, marked Exhibit I.

192 Q. Look at the erasure of the words "executors, administrators, or" in the original policy, and also in the copy, and state whether that erasure was made before the policy left the office.

A. Yes, sir; it was.

Q. Can you tell how it came to be made?

A. Yes, sir.

Q. How was it?

A. On general instructions from the president.

STATEMENT.—This applied to all policies where the beneficiary of the same is the party insured.

Q. You wish to be understood as saying that in all cases where the policy was issued for the benefit of the party whose life was insured the words "executors, administrators, or" were erased?

A. Yes, sir.

Q. Then there was never any special directions given with reference to this policy, was there?

A. No, sir.

Cross-examination:

Q. Does the co. now continue those directions?

A. No, sir.

Q. About when was it discontinued?

A. Well, let me see. Well, I suppose, Jan. 1st, 1873, might say. I am not positive. A short time afterward.

GEO. W. YOUNG.

193 EXHIBIT A.

NORTHWESTERN MUTUAL LIFE INS. CO.,
Milwaukee, Sept. 5th, 1872.

DEAN and PAYNE,
Chicago, Ill.:

GENTS: The exec. com. did not meet till last evening. The following loans vere voted in Ill., viz:

$5,000 to Silas Giddings, sr., Warren Co., Ills., who applies for					$6,000
3,000 " Albert J. Rockwell,	"	"	"	"	$3,000
2,000 " Phineas P. Smith,	"	"	"	"	$2,000
3,000 " Henry Francis, Henderson,		"	"	"	$3,000
18,000 " Benj. F. Baldwin, Green,		"	"	"	$20,000
6,500 " Joab M. Fanning, Morgan,		"	"	"	$6,500
6,000 " E. L. Gillham, Scott,		"	"	"	$7,000

Please have the necessary papers prepared and forwarded at applicants' expense. We would like to pay all the above at an early day.

Yours, truly,

W. H. FARNAAM,
Asst. C'sh'r.

194 EX. A.

24	Giddings, Silas, sr., farmer, self.	Do.	Do. Do. Do. Do. 1 Nov., 1816.	56	66909	Non-p't'g L., 6.000.	A	302 52	302 52	R	C'd Oct., 1872. N. T. (In pencil:) Original policy sent to Hoyne, Horton & Hoyne, Jan'y 10, '74. J. N. P.

EXHIBIT C.

[Northwestern Mutual Life Insurance Company. Dean and Payne, State agents for Illinois, room 50, Central Union block.]

CHICAGO, *Oct. 2d*, 1872.

AUG. GAYLORD, *Sec.*,
Milwaukee:

D'R SIR: Enclosed find policies—
H. H. Hill, № 66913.

C. F. Fiffany, ℔ 67768.
Jas. Kennedy, ℔ 68784.
Silas Giddings, ℔ 68909.
These policies should have accompanied new work rep't.
Respectfully,

DEAN AND PAYNE.

195 EXHIBIT D.—*F. Bloodgood, special exam.*

(Copy.)

Application to the Northwestern Mutual Life Insurance Company.

An answer to each of the following questions is required from persons proposing to effect assurance in this company, which answers form the basis of the contract:

1. Name at full length of the person for whose benefit the assurance is effected:
Silas Giddings, sr.
Residence: Floyd T'sh'p.
Relationship to person to be assured: Self.
2. Name at full length of the person whose life is to be assured: Silas Giddings, sr.
Residence: Floyd, county of Warren, State of Illinois. Post-office address: Cameron. Occupation: Farmer.
What occupation has the person been previously engaged in? Farming.
Has health suffered therefrom? No.
3. Are you now assured in this company? If so, what is the number of the policy, and for what amount? No.
4. Place and date of birth: Cohoss, N. H., eighth day of November, 1816; age nearest birth-day, 56.
5. Is the person to be assured married or single? Married.
6. Has the person resided out of the United States? No.
196 B. If so, where and for what period? B.
7. Has the person been vaccinated? Yes.
Has the person had the small-pox? No.
8. Are the person's parents living? If so, what are their ages and state of health? If dead, at what ages and of what diseases did they die?
Father: Age at death, 45; cause of death, fever-sore.
Mother: Age at death, 80; cause of death, old age.
9. How many brothers has the person had? Whole No., 5; No. living, 4; ages of living, 72, 69, 56, 52. State of their health, very good. No. dead, 1; ages at death, 28; cause of death, fever.
How many sisters? Whole No., 5; No. living, 2; ages of living, 77, 58. State of their health, very good. No. dead, 3; ages at death, 36, 62, infancy; cause of death, child-bed fever, dropsy, small-pox.
10. Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease? No.
Have the person's ancestors generally reached old age? Ages of grandparents; P. G. F., P. G. M., M. G. F., M. G. M.
11. Has the person ever had any of the following diseases or any symptoms thereof: spitting blood, bronchitis, cancer, consump-

197 tion, liver complaint, rheumatism, asthma, rupture, fistula, dropsy, insanity, paralysis, appoplexy, gout, fits, piles, bilious colic, pall pitation or diseases of the heart, of the u inary organs, or of any vita- part? No.

If the person has had one or more of these diseases please state particularly which, when, how severe, and whether fully recovered, and answer "No as to all the rest."

12. Is the person subject to dyspepsia, dysentery, or diarrhœa? No.

13. Has the person ever had an habitual cough? No.

14. Is the person now subject to or affected by any disease or weakness, or has he had any severe disease or received any serious injury other than those stated in the foregoing answers? If so, please state the particulars of the same fully, prefixed by the words "None except." No.

15. Are the brain, the nervous and muscular systems, the lungs, heart, abdominal and urinary organs in a healthy state? Yes.

16. Are the person's habits of life correct and temperate? Yes. Have they always been so? Yes.

17. Name and residence of person's usual medical attendant. Have none.

198 18. Name and residence of an intimate friend to be referred to for similar information. Stephen C. Lee, Cameron, Ills.

19. Amount of policy: $6,000. No. of payments: life. Annual, semi-annual, or quarterly. Annually. Kind of policy: Ordinary, life; non-participating. All cash: Cash.

20. Is the person's life now assured; and if so, for how much, and in what Co.? No.

Has the person ever been declined by any company? If so, why? No.

Has any physician ever given an unfavorable opinion of the person's life? No.

21. Has the person read and assented to the following agreement? Yes.

It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the person is not and will not become habitually intemperate or addicted to the use of opium. And it is hereby agreed by the undersigned that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers, any suppression of facts in regard to the person's health, habits, or circumstances material

199 to the risk, or neglect to pay the premium on or before the day it becomes due, shall vitiate the policy and forfeit all payments made thereon. Such failure to pay, however, shall not forfeit the amount secured by previous payments on a non-forfeiting policy.

Husband may sign for wife and his own name as follows:

JANE DOE,
By JOHN DOE.
JOHN DOE.

Dated this 30th day of July, 1872.

(Signed) SILAS GIDDINGS, SEN.

Agent's statement.

Have you seen the person herein proposed for assurance, and do you

know the same to be the one described in the annexed medical examination? Yes.

Is there anything in form, figure, manners, customs, or appearance which indicates ill health, a feeble constitution, irregular habits, or intemperate living? No.

Have you carefully read over the applicant's, physician's, and examiner's statements, noting whether the age and date of birth agree,
200 or whether there are errors in any of the answers, and have you found them correct and do you believe them true? Yes.

Do you recommend the acceptance of the risk? Yes.

At what agency will renewals be paid? Monmouth.

Dated July 30th, 1872.

(Signed) ROBERTS & HUBBARD,
Agent.

(Signed) DEAN & PAYNE,
Gen'l Agent.

Questions to be answered explicitly by the medical examiner of the company.

N. B.—It is expected that the medical examiner will put such other questions bearing upon the case as he may think proper, and that the whole examination will be thorough, exact, and circumstantial.

1. Name and residence of person examined. Silas Giddings, sr., Floyd T'w'p, Warren Co., Ill.

2. Are you acquainted with the same? No.

3. State the approximate weight, height, and the figure of the applicant. Weight, 255 lbs.; height, 6 ft. 1 in.; figure, erect, robust.

4. Does his general appearance indicate vigorous health, medium health, or want of vigor? Vigorous health.

5. State the measure around the nipples, under the vest, with
201 the lungs empty, A; with lungs full, B; and the form of the chest, C. A, 45 inches. B, 47 inches. C, full.

6. Does auscultation or percussion of the chest indicate disease of the heart or respi'tory organs? No.

7. A. Is the respiratory murmur clear and distinct in every part of both lungs? B. Is the character of the respiration full, easy, and regular? C. Are there any indications of disease of the organs of respiration? A, yes. B, yes, C, no.

8. A. State the rate and other qualities of the person's pulse. B. Does it intermit, become irregular, or unsteady at this examination? A, 70 per min., full, regular. B, no.

9. A. Is the character of the heart's action uniform, free, and steady? B. Are its sounds and rhythm regular and normal? C. Are there any indications of disease of this organ or of the blood vessels? A, yes. B, yes. C, no.

10. Is the person subject to cough, expectoration, difficulty of breathing or palpitation? No.

11. Are the functions of the brain, the muscular and nervous systems in a healthy state? Yes.

202 12. A. Are the abdominal organs in a healthy condition? B. Are the functions of the kidneys, bladder, and other urinary organs in a healthy state, and free from any tendency to disease? (Please apply the tests if there is any reason to suspect disease of the kidneys.) A, yes. B, yes.

13. Has the person any predisposition, either hereditary or acquired, to any local or constitutional disease? No.

14. Do you believe the person to be sober and temperate in his habits of life? Yes.

15. Have the person's parents, brothers or sisters been afflicted with pulmonary or other diseases, hereditary in their nature? No.

16. A. Has the person ever had any severe injury or illness? B. If so, has it had any effect on his constitution? A, no. B, no.

17. Is the application all filled out, and have you carefully read the same? Yes.

18. Do you consider the life safely assurable; and do you recommend that a policy be granted? (Answer I do, or, I do not.) I do. I believe it to be a good risk.

203 (Signed) WILLIAM WALKER, *M. D.*,
Medical Examiner.

Dated, Monmouth, Ill., July 30, 1872.

(If the person is a female, ascertain and state whether she has had children, how many, when last pregnant, whether she has had any miscarriages, and are her menses now regular.)

Questions, each of which is to be answered by the physician of the person applying for assurance.

1. Name of the person whose life is to be assured.

2. How long have you known him? Have you been in the habit of seeing him frequently? Have you given him medical advice? For what disease? At what time?

3. A. Have you any knowledge of the person's parents, brothers and sisters? Have they been afflicted with any pulmonary complaints, or any other hereditary diseases?

4. Has he at any time been afflicted with insanity, rheumatism, gout, dropsy, bilious colic, palsy, symptoms of disease of the heart, aneurisim, rupture, spitting of blood, asthma, chronic cough, affections of
204 the lungs or other viscera, or with any organic disease?

5. Has he any organic disease in any part of the body, or is any suspected?

6. Has he, in your opinion, a hereditary predisposition to any disease; and, if so, what is it?

7. Do you believe he is now in good health?

8. Is he sober and temperate? Has he always been so?

9. Is he accustomed to much exercise, or is he sedentary?

10. Is his constitution healthy; and are his habits and circumstances such as to render his life safely assurable?

(Signed)

Dated

Friend's statement.

I have been personally acquainted with Silas Giddings, sr., of Floyd Township, during the last five years, and do believe that his habits of living are temperate, and that he is now in good health, and does ordinarily enjoy good health, and that I know of no constitutional infirmity or other circumstance affecting him calculated to make an assurance on his life more than usually hazardous, excepting*

* Add "nothing," if that is true, or whatever is the matter.

Dated at Monmouth, this 30th day of July, 1872.
(Signed) GUY STOPP.

205 The Northwestern Mutual Life-Insurance Company, Milwaukee.
Life proposed, Silas Gidding, sr.
Occupation, farmer.
Age, 56.
Residence, Floyd Township.
Amount of policy, $6,000.
Premium, $302.52.
Kind of policy, ord. life.
How payable, annual.
Agent, B. F. O. Hubbard.
Agents will please fill these blanks.
Exhibit D.

206 EXHIBIT E.—*Fr. Bloodgood, special exam.*

CHAPTER 129.

Private and local laws, 1857.

An act to incorporate the Mutual Life-Insurance Company of the State of Wisconsin.

The people of the State of Wisconsin represented in senate and assembly, do enact as follows:

SECTION 1. Thomas Lappin, M. C. Smith, W. W. Holden, David Noggle, Edward McKey, Solomon Hutson, James H. Knowlton, John P. Dickson, Joseph A. Sleeper, Edward L. Dimock, B. F. Pixley, John Hackett, John M. Keep, Matt. H. Carpenter, Charles Kuehn, Simeon Mills, James Niel, J. F. Willard, John Mitchell, James R. Doolittle, George C. Northrop, H. J. Ullman, Anson Eldred, H. H. Camp, J. B. Martin, Luke Stoughton, L. J. Farwell, H. L. Donsman, J. Allen Barber, John H. Rountree, George W. Lee, James H. Earnest, A. Ludlow, James Bintliff, and Peter Myers, and Lucius G. Fisher, and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be and are declared a body politic and corporate by the name of "Mutual Life-Insurance Company of the State of
207 Wisconsin," and by that name may contract and be contracted with, sue and be sued, defend and be defended against, in any and all courts.

SECTION 2. This corporation shall have no powers or privileges except such as are expressly granted by this charter.

SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess, and convey shall—

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business.

2d. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted or for money due.

3d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

208 4th. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold, or convey real estate in any other case, or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company, and the convenient transaction of its business, shall be sold and disposed of within six years after the company shall have acquired title to the same.

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer.

SECTION 5. All the corporate powers of the said board of trustees, and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a
209 member of the corporation; and they shall have power to declare by by-laws what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business, and nine shall be such quorum until otherwise provided by by-laws. The trustees shall also have power to make all such by-laws as shall be useful or proper to the due exercise of the powers hereby granted.

SECTION 6. The persons named in this act shall constitute the first board of trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the second class expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year, and so on, successively, each and every year. The seats of these classes shall be supplied by the members of this corporation—plurality of the votes cast constituting a choice; but an insurance of at least one thousand dollars in amount shall be necessary to entitle any
210 member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number, occasioned by death, resignation or by removal from the State. The election of trustees shall be held on the first Monday of June, in each and every year, at such place in the city of Janesville, as the board of trustees shall designate, of which they shall give at least four weeks' previous notice in two of the public newspapers printed in Milwaukee, Madison and Janesville, and the board of trustees at the same time shall appoint three of the members of the said corporation, inspectors, to preside at such election, and if any of said inspectors decline or fail to attend, the trustees shall appoint others to fill such vacancies.

SECTION 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall ever be withdrawn from said company, except as hereinafter
211 provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter.

SECTION 8. The trustees shall determine the rates of insurance and the sums to be insured.

SECTION 9. It shall be lawful for said corporation to invest the said premiums in the securities designated in the two following sections, and

to sell, transfer and change the same, and re-invest the funds of said corporation when the trustees shall deem expedient.

SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages, or unincumbered real estate within this State. The real estate or other property to secure such investment of capital, shall in every case be worth twice the amount loaned thereon.

SECTION 11. The trustees shall have power to invest a certain portion of the premium received, not to exceed one-half thereof, in public
212 stocks of the United States, or of this State, or of any incorporated city of this State.

SECTION 12. Suits at law may be maintained by said corporation against any of its members for any cause relating to the business of the corporation. Suits at law may also be prosecuted and maintained by any member against said corporation for loss by death, if payment is withheld more than three months after the company is duly notified of such losses, and no member of the corporation shall be debarred his testmony as a witness in any such cause on account of interest in such suit, or of his being a member of said company, and no member of the corporation not being in his individual capacity a party to such suit, shall be incompetent as a witness in any such suit on account of his being a member of said company.

SECTION 13. The officers of said company at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter and during the first sixty days of every subsequent period of five years, shall cause a balance to be
213 struck of the affairs of the company, and shall credit each member with an equitable share of the profits of said company, and in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance as aforesaid shall be paid over to the person entitled to receive the same. Any member who would be entitled to share in the profits, who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company. No member, except officers of the company and agents thereof, shall be personally liable for the losses of the company, and such officers and agents, severally, shall be liable, but only for the losses arising by reason of their own respective neglect or misconduct.

SECTION 14. On some day in the first thirty days after the expiration of the first five years from the time when the said company shall issue its first policy, and within the first thirty days of every subsequent five years, the officers of said company shall cause to be made a general balance statement of the affairs of said company, which shall be
214 entered in a book prepared for that purpose, which shall be subject to the examination of every member of the company, during the usual hours of business, for the term of thirty days thereafter. Such statement shall contain:

1st. The amount of premiums received during said period.

2nd. The amount of expenses of said company during the same period

3rd. The amount of losses incurred during the same period.

4th. The balance remaining with the said company.

5th. The nature of the security on which the same is invested or loaned, and the amount of cash on hand.

The said company shall also make and transmit to the secretary of state, on the first Monday of January, in each year, a full statement of

its affairs, in the same or like manner as moneyed corporations are required to do.

SECTION 15. The operations and business of this corporation shall be carried on in the city of Janesville, at such place as the trustees shall direct, so far as the same can be done at a principal office.

215 SECTION 16. No policy shall be issued by said company until application shall be made for insurance in the aggregate for two hundred thousand dollars at least. The trustees shall have a right to purchase for the benefit of the company all policies of insurance or other obligations issued by the said company.

SECTION 17. It shall be lawful for any married woman by herself, and in her name, or in the name of any third person with his assent as her trustee, to cause to be insured for her sole use the life of her husband for any definite period, or for the term of his natural life, and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors, but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars. In case of the death of the wife before the decease of her husband, the amount of the insurance may be

216 made payable after death to her children for their use and to their guardian, if under age.

SECTION 18. This act shall be perpetual, but the legislature may at any time alter or amend the same.

SECTION 19. This act is hereby declared a public act, and shall be printed by the State printer immediately, and when so printed, the same shall take effect and be in full force.

WYMAN SPOONER,
Speaker of the Assembly.
ARTHUR McARTHUR,
Lieut. Gov. and President of the Senate.

Approved March 2, 1857.

COLES BASHFORD.

217 CHAPTER 169.

Private and local laws, 1858.

An act to amend an act to incorporate the "Mututual Life Insurance Company" of the State of Wisconsin, approved March 2, 1857.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. The Mutual Life Insurance Company of the State of Wisconsin shall have a common seal, and shall have power to make reinsurance of any risks which they may have taken, and may make all such by-laws not inconsistant with the constitution and laws of this State as may be deemed necessary for the appointment of its officers and agents, and the conduct of its affairs in the various cities and towns of this State, and of sister States and foreign governments, as the said corporation may deem most for its interest.

SECTION 2. Any officer, agent or trustee, who shall be convicted of having abstracted or taken any money or evidences of debt, or

218 property belonging to this corporation, and shall have disposed

of it or have placed it beyond the reach of the officers of this corporation without having first had authority from the board of trustees, or from the finance committee, by a resolution entered upon their books so to do, shall be deemed guilty of a felony, and shall be adjudged to pay a fine in a sum not exceeding five times the amount of the sum proven to have been abstracted, and shall be sentenced to confinement in the State prison for not more than five years, in the discretion of any court having cognizance thereof.

SECTION 3. Any member of this company shall have the right to vote by proxy as well as in person.

SECTION 4. It is hereby declared that in the judgment of the legislature of this State the objects of the foregoing amendments cannot be attained under general laws.

SECTION 5. This act shall take effect and be in force from and after its passage.

F. S. LOVELL,
Speaker of the Assembly.
H. H. GILES,
President of the Senate pro tem.

Approved April 24, 1858.

ALEX. W. RANDALL.

219 CHAPTER 35.

Private and local laws, 1859.

An act to amend the charter of the "Mutual Life Insurance Company" of the State of Wisconsin.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. The annual report required to be made by section one of chapter one hundred and three of the general laws of 1858 may be made by the "Mutual Life Assurance Company" of the State of Wisconsin in the month of June in each and every year.

SECTION 2. The words 'in the city of Janesville' where they occur in the sixth and fifteenth sections of the act incorporating said company, are hereby stricken out.

SECTION 3. This act shall take effect and be in force from and after its passage.

WM. P. LYON,
Speaker of the Assembly.
E. D. CAMPBELL,
Lieutenant Governor and President of the Senate.

Approved February 23, 1859.

ALEX. W. RANDALL.

220 CHAPTER 323.

General laws, 1863.

An act to amend chapter one hundred and seventy-nine of the private and local laws of 1857, entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin."

The people of the State of Wisconsin represented in senate and assembly, do enact as follows:

SECTION 1. Section five of chapter one hundred and seventy-nine of the private and local laws of 1857, entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," is hereby so amended as to read as follows, viz:

"SECTION 5. All the corporate powers of the said company shall be vested in and exercised by a board of trustees, and such committees and officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons. They shall elect a president annually, who shall be a trustee and a member of the corporation, and they shall have power to declare by law what number of trustees, less
221 than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business, and nine shall be such quorum until otherwise provided by by-law. The trustees shall have power to make all such by-laws as shall be needful or proper to the exercise of the powers hereby granted."

SECTION 2. Section six of the said act is hereby so amended as to read as follows:

"SECTION 6. The persons named in this act shall constitute the first board of trustees, and they shall, at their first meeting, divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the second class shall expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year; and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice, but an insurance of at least one thousand dollars in amount shall be neces-
222 sary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number occasioned by death, resignation, or in any other manner. The election of trustees shall be held at the office of said company, in the city of Milwaukee, on the second Wednesday of June in each year, of which they shall give at least four weeks' previous notice in one or more of the public newspapers printed in Milwaukee and Madison; and the board of trustees at the same time shall also appoint three of the members of the said corporation inspectors to preside at such election; and if any of said inspectors decline or fail to attend, the trustees shall appoint others to fill such vacancies."

SECTION 3. Section ten of the said act is hereby so amended as to read as follows, viz:

"SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section,
223 shall be invested in bonds secured by mortgages on unincumbered real estate. The real estate or property to secure such investment or capital shall in every case be worth twice the amount loaned thereon."

SECTION 4. Section eleven is hereby so amended as to read as follows, viz:

"SECTION 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city of this State; and the company may loan to policy-holders in said company, from time to time, sums not exceeding one-half of the annual premiums on their policies, upon notes to be secured by the policy of the person to whom the loans may be made."

SECTION 5. The said company may cause a balance to be struck of the affairs of said company, and a dividend of its profits to be made among the members thereof, as provided in section thirteen of the said act of incorporation thereof, annually, biennially, triennially, or
224 once in five years, as the board of trustees may determine, and the dividend of profits, when so made, may, at the option of each member entitled thereto, and with the consent of the board of trustees, be appropriated to the purchase of additional insurance, or in reduction of or towards the payment of annual premiums, or credited to the insured, to be paid over at the decease of the insured, or to the person entitled to receive the same, in the same manner and upon the same conditions as the amount insured by the policy of such member.

SECTION 6. This act shall take effect and be in force from and after its passage.

ALLEN BARBER,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved March 23, 1863.

EDWARD SALOMON,
Governor.

225 CHAPTER 1.

General laws, 1865.

An act to change the name of the Mutual Life Insurance Co. of the State of Wisconsin.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. That the corporate name of the Mutual Life Insurance Company of the State of Wisconsin, a corporation duly created by and organized pursuant to an act entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, and the several acts amendatory thereof, be, and the same is hereby, changed to "The Northwestern Mutual Life Insurance Company;" and by the latter name the said "The Mutual Life Insurance Company of the State of Wisconsin" shall hereafter be known in all courts and places, and enjoy the same corporate rights and franchises, and be subject to the same duties, obligations and liabilities, as by said former name; and the said corporation may hereafter sue and be sued, plead and be impleaded, answer and be answered unto, in all courts
226 and places by the said name of "The Northwestern Mutual Life Insurance Company," for, upon, and by reason of any contracts, liabilities, or cause of action made, had, incurred or suffered by said corporation prior to the time this act shall take effect, with the same effect and in the same manner as if the same had been made, had, incurred or suffered in and by the said name of "The Northwestern Mutual Life Insurance Company."

SECTION 2. The annual meeting of the members of said company for the purpose of electing trustees thereof shall, after the year (A. D.) 1865, be held on the second day of January in each year, and the trustees who shall be elected at the annual meeting of the said company, which shall be held on the second Wednesday of June, A. D. 1865, shall

hold their offices until the second Wednesday of January, one thousand eight hundred and sixty-nine, and the term of office of those trustees now in office, which would expire but for the passage of this act on the second Wednesday of June, in the year one thousand eight hundred and sixty-six, one thousand eight hundred and sixty-seven, and one thousand eight hundred and sixty-eight, shall expire, and their
227 successors may be chosen at the annual meeting to be held on the second Wednesday of January in each of said years respectively. The trustees elected at the annual meeting to be held on the second Wednesday of January, A. D. 1866, and annually thereafter, shall hold their respective offices for four years unless sooner removed, according to law.

SECTION 3. This act shall take effect and be in force from and after the first day of March, A. D. one thousand eight hundred and sixty-five.

WM. W. FIELD,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved January 20, 1865.

JAMES T. LEWIS,
Gov. Wisconsin.

CHAPTER 371.

Private and local laws.

An act to amend an act entitled "An act to incorporate The Mutual Life Insurance Company of the State of Wisconsin," ap-
228 proved March 2d, 1857, and the several acts amendatory thereof.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Section eleven of an act entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, is hereby so amended as to read as follows:

"SECTION II. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city of this State. And the company may loan to policy holders in said company, from time to time sums not exceeding one-half the annual premiums on their policies upon notes to be secured by the policy of the person to whom the loans may be made; provided, however, that the said trustees are hereby authorized, at their discretion, to invest so much of the assets of the said company in the State bonds, or other securities of any State of the United States in which they may desire to transact the business of life insurance, as may be necessary
229 to comply with the requirements of the laws of such State relating to life insurance companies incorporated by other States."

SECTION 2. This act shall take effect and be in force from and after its passage.

A. M. THOMPSON,
Speaker of the Assembly.
G. C. HAZELTON,
President of the Senate, pro tem.

Approved March 9, 1869.

LUCIUS FAIRCHILD,
Governor.

CHAPTER 329.

Private and local laws, 1870.

An act to amend chapter 129 of the private and local laws of 1857, entitled "an act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, the name of which has since been changed to the "Northwestern Mutual Life Insurance Company" and the several laws amendatory thereof.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

230 SECTION 1. Chapter 129 of the private and local laws of 1857, entitled "An act to incorporate The Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, the name of which corporation was changed to the "Northwestern Mutual Life Insurance Company," by an act entitled "an act to change the name of The Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and published and designated as chapter one of the supplement to private and local laws of 1865, is hereby amended by inserting in the said original act, immediately after section eighteen, the following to stand as sections 19, 20, and 21.

"SECTION 19. The annual meeting of the members of the said Northwestern Mutual Life Insurance Company, for the purpose of electing trustees thereof, shall be hereafter held on the last Wednesday of January in each year and the trustees elected at each annual election hereafter held shall hold their respective offices for four years, unless sooner removed according to law; except such as may be elected to fill vacancies, who shall hold their respective offices until the expiration of

231 the term of office of the class of trustees to which they may respectively belong. The trustees now in office shall hold their respective offices until the day of the annual election, at which their successors are to be elected pursuant to this section, unless sooner removed according to law.

"SECTION 20. No person shall be eligible to the office of trustee of the said company, unless he shall have effected an insurance upon his own life for the benefit of himself, his wife, heirs, or representatives, for at least five thousand dollars, which shall be in full force and effect, on which he shall have paid the premium for at least one year. Every trustee of the said company shall during his whole term of service be a citizen of the United States, and at least two-thirds of all the trustees of the said company who may be hereafter elected shall have resided in this State one year next preceding their election and be residents of the same during their continuance in office. The number of persons eligible to the office of trustee in said company, equal to the num-

232 ber of trustees to be elected at each annual election, who shall receive the highest number of votes cast thereat, shall be chosen trustees. An insurance of at least one thousand dollars effected by a person upon his own life or upon the life of another for his own benefit, or the benefit of his wife, heirs, or personal representatives, shall be necessary to entitle any member to a vote, and each member shall be entitled to one vote for each one thousand dollars of insurance he may have effected in said company as aforesaid, such insurance being in force at the time of the election.

"SECTION 21. Members of said company may vote by proxies, dated and executed within sixty days next preceding and returned to the

chief office of the said company for examination and registry upon the books of the company at least three days previous to the meeting of the members of the company, at which the same are to be used,
233 but no person shall be allowed to cast by proxy more than one hundred votes in addition to the votes to which he may be entitled as a member of the company on his own insurance; and no officer, trustee, agent, or employé of said company shall act or be entitled to vote as proxy for an absent member."

SECTION 2. Section nineteen of said original act is hereby numbered section 22, and section two of chapter one of the supplement to the private and local laws of 1865, entitled "An act to change the name of the Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and all provisions of the act of which this act is amendatory, conflicting with the provisions of this act, are hereby repealed.

SECTION 3. This act shall take effect and be in force from and after its passage.

J. M. BINGHAM,
Speaker of the Assembly.
THAD. C. POUND,
President of the Senate.

Approved March 15th, 1870.

LUCIUS FAIRCHILD,
Governor.

234 STATE OF WISCONSIN,
Secretary's Office, ss:

The secretary of state of the State of Wisconsin hereby certifies that the foregoing has been compared with the original enrolled acts on file in this office, and that the same is a true and correct copy thereof, and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed the great seal of the State at the capitol in Madison, this first day of November, A. D. 1875.

[SEAL.]

S. CADWALLADER,
As'st Secretary of State.

Exhibit E.

235 EXHIBIT G.—*Fr. Bloodgood, special examiner.*

Board, and such bond or bonds after each annual election shall be submitted to the board.

SECTION 10. A committee of five trustees shall be appointed annually by the board of trustees, at the first meeting after the annual election of trustees, to be called the executive committee. The president and vice-president shall be ex officio members of the executive committee. The executive committee shall hold their office until the next annual election of trustees and officers after their appointment, or until removed by the board of trustees.

Executive committee.

The executive committee shall possess all the power and authority when the board of trustees is not in session that the board of trustees does or can possess when in session, by virtue of the act of incorporation, or any other act affecting the power and authority of the corporation or its trustees or by virtue of these by-laws, or any law of this State. They shall keep a record of all their transac-

Powers of executive committee.

tions, which shall be read at each quarterly meeting of the board
236 of trustees, and the board of trustees, at such quarterly meeting, shall have the same power to disapprove, rescind, and annul any act or transaction of the executive committee subsequent to the last preceding quarterly meeting of the board that they would have to disapprove, rescind, or annul any previous act or transaction of the board of trustees; and acts and transactions of the executive committee not disapproved, rescinded, or annulled, shall be held or taken to be approved and confirmed by the board of trustees.

Reports. SECTION 11. Every report of a committee shall be in writing, and signed by the members of the committee assenting thereto, and all reports shall be recorded by the secretary.

Vice-president. SECTION 12. A vice-president shall be elected annually, whose term of office shall be the same as that of the president, who shall exercise all the powers and duties of the president whenever the president shall be absent or unable from any cause to discharge his duties in person.

President pro tempore. A president pro tempore may be appointed by the trustees who, in case of the absence or inability of the president and vice-president to attend to their duties, shall exercise the powers
237 and perform the duties of the president during the continuance of such absence or inability.

Treasurer. SECTION 13. The treasurer shall safely keep the funds of the company which shall come to his hands, and disburse the same only upon the warrant of the president, countersigned by the secretary.

Loans. SECTION 14. No loan shall be made by the company on security of country real estate, except on improved farms, and then not beyond half the value of the property offered as security exclusive of the buildings.

Interest. SEC. 15. No interest shall be allowed to remain due longer than six months, on any bond and mortgage to the company, without a foreclosure or suit being directed by the president, unless the board authorize a longer delay.

Inspectors. SEC. 16. The board of trustees, shall at their last stated meeting previous to the annual election appoint three of the members of the said corporation, who are not trustees, as inspectors, to preside at said election, and they may authorize the president to appoint substitutes in case one or more of said inspectors declines or fails to attend.

Special meetings. 238 In case said meetings shall fail to take place, the president may call a special meeting for the purpose aforesaid, of which special notice shall be given.

Amount of risk on one life. SEC. 17. No policy shall be issued on any single life for a greater amount than twenty thousand dollars.

Payment of bonds. SEC. 18. No payment of the principal of bonds shall be deemed valid, except upon the joint receipts of the president and secretary, and this shall be incorporated in the bond as a part of the contract.

Securities required on loans. SEC. 19. Before any money is paid out for authorized loans, the following securities and documents must be lodged with the president, duly certified by counsel to be valid and correct:

First. The bond is to be delivered to him, and the mortgage on the property is to be left to be duly recorded in the proper office.

Second. The abstract of the title containing examinations continued

to the time of recording the mortgage. Also which abstract shall have original searches for judgment, mortgage, and other liens annexed, except in cases where original searches have been made and are on file with the clerk of same court, in which cases copies may be taken
239 and annexed, reference being made to the court in which such original is filed, and shall also contain certificates of searches for taxes and other assessments.

Third. The requisite policies of fire insurance.

Fourth. When there are prior incumbrances to be paid out of any loan this company may make on property, and said incumbrance is not removed by the party to whom the loan is to be made, and independantly of this company, it shall be first removed by this company by paying the amount of incumbrances directly to holding it.

The balance of the money agreed to be loaned is then to be paid to the party entitled to the same.

SEC. 20. No commissions, direct or indirect, shall be received by the counsel of this company for procuring or facilitating loans from the company, and the charges made by them for examining titles, etc., shall not exceed the usual charges made by the profession to their individual clients for similar services.

Charges of counsel.

SEC. 21. At the close of each fiscal year the accounts and assets of the company shall be examined by a special
240 committee of three trustees, whose report shall be placed on the minutes.

Examination.

SEC. 22. The by-laws may be altered at any meeting specially called for that purpose.

Alteration of by-laws.

SEC. 23. The by laws of this company heretofore adopted are hereby repealed.

241 EXHIBIT I.—*Fr. Bloodgood, Special Exam.*

THE NORTHERN MUTUAL LIFE INSURANCE COMPANY.

Number 68909. Amount, $6,000. Age, 56. Premium, $302.52.

By this policy of insurance, in consideration of the representations made in the application therefor, and of the premium in advance, as herein stipulated, consisting of the annual cash premium of three hundred & two and $\frac{52}{100}$ dollars, to be paid at or before noon on or before the 24th day of August in every year during the continuance of this policy, doth assure the life of Silas Giddings, sr., a farmer of Floyd, in the county of Warren, State of Illinois, for the benefit of himself, of six thousand dollars for the term of his natural life.

And the said company doth hereby promise and agree to pay the said sum assured at its office to the said beneficiary or his* assigns in sixty days after due notice and proof of death of the said person whose life is hereby assured (the balance of the year's premium and the amount
242 of all other indebtedness to the company on account of this policy, if any, being first deducted therefrom). In case of the death of the said beneficiary before or at the time of the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the heirs or assigns of the said person whose life is assured.

In consideration of the reduced rate of premium upon this policy

*The words "executors, administrators, or," erased by drawing a pen through them.—COP.

(which is of the class known as non-participating), all claim for dividends is waived by the claimants under this policy; of which waiver the acceptance of the policy is due and sufficient acknowledgment.

And the said company further promises and agrees that if, after two or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid-up non-participating policy for as many times $13,932 as there shall have been annual premiums so paid, provided this policy be then freed from all indebtedness to the company, and provided also that written application therefor, and this policy,
243 and all interest therein be surrendered within six months from the date of such default.

This policy is issued and accepted by the parties in interest on the following express conditions:

1st. The person whose life is assured is permitted to travel by the usual routes to or from California, or to or from any portion of the Western Hemisphere north of the tropic of Cancer, or to or from any portion of Europe, and to reside within said limits north of the tropic aforesaid.

2d. If the said person shall pass beyond the aforesaid limits, or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or as engineer or fireman of any locomotive engine; or be employed in any capacity on the trains of a railroad, excepting as passenger or sleeping-car conductor, mail agent, express messenger, or baggage master; or in ocean navigation, excepting as master, mate, or pilot of first-class steam or sailing vessels plying between ports within the limits of the
244 tropics before mentioned; or shall enter or be engaged in any military or naval service whatsoever (except in time of peace), or shall undertake an aerial voyage without in each or either of the foregoing cases having first obtained the written consent of the company; or shall die in consequence of a duel, or of the violation or attempted violation of any law of any nation, state, or province; or shall become so far intemperate as to impair health or induce delirium tremens; or shall, whether sane or insane, die by his or her own hand or act; or if any of the statements or declarations in the application for this policy and upon the faith of which it is issued shall be found in any material respect untrue, then, and in every such case, this policy shall be null and void.

3rd. If the said premiums shall not be paid on or before the days before mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary.

245 4th. In every case where this policy shall cease or become null and void, all payments thereon shall become forfeited to the company, except as above provided, and except that in case the person whose life is assured die by his or her own hand or act the company shall return the premium received.

5th. If the said person whose life is assured shall become in any sense an inebriate, the company shall have the right to declare this policy cancelled, and shall be absolved from all liability under it on paying or tendering payment to the holder thereof the amount of the "surrender value" at the time of such payment or tender as determined by the company's tables.

6th. If this policy is assigned or held as security, a duplicate of the

assignment shall thereupon be given to this company, and due proof of insurable interest produced with proofs of death.

7th. This policy shall not take effect and become binding on the company until the premium shall be actually paid during the lifetime of the person whose life is assured, to the company or to some per-
246 son authorized to receive it, who shall countersign the policy on receipt of the premium.

In witness whereof the Northwestern Mutual Life Insurance Company at its office in Milwaukee, Wisconsin, has by its president and secretary, signed and delivered this contract this 24th day of August, one thousand eight hundred and seventy-two.

JOHN H. VAN DYKE,
President.

AUG. TAYLOR,
Secretary.

Countersigned by , agent.
Non-part'ng life above 40. Form 20 C, May 1st, 1872.

247 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Francis Bloodgood, a commissioner duly appointed by the circuit court of the United States for the eastern district of Wisconsin, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, and special examiner appointed by the circuit court of the United States for the northern district of Illinois, in a certain suit pending in said last named court in chancery, wherein Loring Giddings and Leander Giddings, administrators of the es-
248 tate of Silas Giddings, deceased, are the complainants, and The Northwestern Mutual Life Insurance Company is the defendant, to take the testimony of witnesses for the defendant residing in the city of Milwaukee, in the State of Wisconsin, do hereby certify that, pursuant to the annexed notice and stipulation, I took the testimony of Willard Merrill, Wm. H. Farnham, and George W. Young, all of the city of Milwaukee aforesaid, and that the foregoing depositions hereto annexed are the depositions so taken; and that the exhibits marked Complainant's Exhibit "A," Exhibit "A," Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "G," Exhibit "H," and Exhibit "I" are the exhibits referred to in said deposition.

I further certify that I was attended by each of the parties or their counsel at the time and place as stated in the caption of the said deposition, and by the said witnesses, and that the said witnesses, being of sound mind and lawful age, were, before the commencement of the taking of their depositions, by me duly and publicly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, and that
249 the depositions as given were reduced to writing in short-hand by my phonographic reporter in the presence of said counsel and in presence of said witnesses, and from his statements and that the said depositions when completed were copied out from the memorandum of said reporter, and were carefully read over by said witnesses and sub-

scribed by them in my presence and in the presence of such of the parties and counsel in the said cause as were in attendance.

And I further certify that in the caption and body of said deposition and in said stipulation annexed is contained a complete record of all the proceedings before me at the time of the taking of the same, and that I have retained the said deposition in my possession for the purpose of depositing the same with my own hand in the post-office at the city of Milwaukee, addressed to the circuit court of the United States for the northern district of Illinois, at Chicago, Illinois (William H. Bradley, esq., clerk), the court for which the same was taken.

And I do further certify that I am not of counsel or attorney
250 for either of the parties in the caption of said deposition named; nor anywise interested in the event of said cause.

In testimony whereof I have hereunto set my hand this 24th day of June, A. D. 1876, and of the Independence of America the 100th year.

FR. BLOODGOOD,
U. S. Commissioner E. District of Wisconsin,
Special Commissioner in Chancery, &c.

251 EXHIBIT 4.

STATE OF ILLINOIS,
Warren County, ss:

Thomas Temple, being first duly sworn, on his oath states that he is a practising physician in said county of Warren, and has been for fifteen years last past; that he was personally acquainted with Silas Giddings, late of said county, and his attending physician; that the said Silas Giddings was a resident of Floyd Township, in said county; that at the time of his death he was about 56 years of age; that he was by occupation a farmer; that the said Giddings was taken sick on or about the 15th day of August, A. D. 1872, and died on the 4th day of September, A. D. 1872; that the date of his first visit was Aug. 15th, 1872, and the date of his last visit was Sept. 3rd, 1872; that the cause of the death of the said Silas Giddings was acute pleurisy, ending in effusion in the chest; and further said deponent saith not.

THOMAS TEMPLE, *M. D.*

Subscribed and sworn to before me this 29th day of October, A. D. 1872.

[SEAL.] JOHN J. GLENN,
Notary Public.

252 STATE OF ILLINOIS,
Warren County, ss:

William Miiler, being first duly sworn, on his oath states that he resides in the county of Warren, State of Illinois; that he was personally acquainted with Silas Giddings, late of said county; that the said Silas Giddings departed this life on the 4th day of September, A. D. 1872; that he was present when he died; that he was present when he was interred; that he assisted in the burial of the said Silas Giddings; that his remains were deposited in the burial grounds known as the Miswell Burial Grounds, two miles south of the village of Cameron, in said Warren County, on the 5th day of September, A. D. 1872.

WILLIAM MILLER.

Subscribed and sworn to before me this 29th day of October, A. D. 1872.

[SEAL.] JOHN J. GLENN,
Notary Public.

253 THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Number 68909. Amount, $6,000. Age, 56. Premium, $302.52.

By this policy of assurance in consideration of the representations made in the application therefor, and of the premium in advance as herein stipulated, consisting of the annual cash premium of three hundred two and $\frac{52}{100}$ dollars, to be paid at or before noon, on or before the 24th day of August in every year during the continuance of this policy, doth assure the life of Silas Giddings, s'r, a farmer, of Floyd, in the county of Warren, State of Illinois, for the benefit of himself, of six thousand dollars, for the term of his natural life.

And the said company doth hereby promise and agree to pay the said um assured, at its office, to the said beneficiary or his* assigns in sixty days after due notice and proof of death of the said person whose life is hereby assured (the balance of the year's premium and the amount of all other indebtedness to the company on account of this policy, if any, being first deducted therefrom). In case of the death of the said
254 beneficiary before or at the time of the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the heirs or assigns of the said person whose life is assured.

In consideration of the reduced rate of premium upon this policy (which is of the class known as non-participating) all claim for dividends is waived by the claimant under this policy; of which waiver the acceptance of the policy is due and sufficient acknowledgment.

And the said company further promises and agrees, that if after two or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid up non-participating policy for as many times $139.32 as there shall have been annual premiums so paid; provided this policy be then freed from all indebtedness to the company, and provided also that written application be made therefor, and this policy and all interest therein be surrendered within six months from the date of such default.

This policy is issued and accepted by the parties in interest on
255 the following express conditions:

1st. The person whose life is assured is permitted to travel by the usual routes to or from California, or to or from any portion of the western hemisphere north of the tropic of Cancer, or to or from any portion of Europe, and to reside within said limits north of the tropic aforesaid.

2d. If the said person shall pass beyond the aforesaid limits, or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or as engineer or fireman of any locomotive engine; or be employed in any capacity on the trains of a railroad, excepting as passenger or sleeping car conductor, mail agent, express messenger, or baggage-master, or in ocean navigation, excepting as master, mate, or pilot of first class steam or sailing vessels plying between ports within the limits of the tropics before mentioned; or shall enter or be engaged in any military or naval service whatever (except in time of peace) or shall undertake an ærial voyage, without in each of the foregoing cases having first ob-
256 tained the written consent of the company, or shall die in conse-

*"Executors, administrators, or" erased by drawing a pen through the printed words.—COPYIST.

quence of a duel, or of the violation or attempted violation of any law *of any law* of any nation, state, or province, or shall become so far intemperate as to impair health or induce delirium tremens, or shall, whether sane or insane, die by his or her own hand or act, or if any of the statements or declarations in the application for this policy and upon the faith of which it is issued, shall be found in any material respect untrue, then, and in every such case, this policy shall be null and void.

3rd. If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary.

4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company, except as above provided, and except that in case the person whose life is assured die by his or her own hand or act, the company shall return the premium received.

257 5th. If the said person whose life is hereby assured shall become in any sense an inebriate, the company shall have the right to declare this policy canceled, and shall be absolved from all liability under it on paying, or tendering in payment to the holder thereof, the amount of the "surrender value" at the time of such payment or tender, as determined by the company's tables.

6th. If this policy is assigned or held as security, a duplicate of the assignment shall thereupon be given to this company, and due proof of insurable interest produced with proofs of death.

7th. This policy shall not take effect and become binding on the company until the premium be actually paid, during the lifetime of the person whose life is assured, to the company or to some person authorized to receive it, who shall countersign the policy on receipt of the premium.

258 In witness whereof The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has, by its president and secretary, signed and delivered this contract, this twenty-fourth day of August, one thousand eight hundred and seventy-two.

JOHN H. VAN DYKE,
President.

AUG. GAYLORD,
Secretary.

Countersigned by , agent.

Non-part'ng life. Above 40. Form 20 C. May 1st, 1873.

(Copy of the application upon which this policy was issued.)

[No. ——]

Application to the Northwestern Mutual Life Insurance Company.

An answer to each of the following questions is required from persons proposing to effect assurance in this company, which answers form the basis of the contract.

1. Name at full length of the person for whose benefit the assurance is effected.	Silas Giddings, s'r. Residence, Floyd, Ills. Relationship to person to be assured. Self.
2. Name at full length of the person whose life is to be assured.	Silas Giddings, s'r.

Residence, Floyd, county of Warren, State of Illinois. Post-office address, Cameron.
Occupation. Farmer. What occupation has the person been previously engaged in? Farming. Has his health suffered therefrom? No.

3. Are you now assured in this company? If so, what is the number of the policy and for what amount?	No.

	Day.	Month.	Year.	Age nearest birthday.
260 4. Place and date of birth? Cohoss, N. H.	8	Nov.	1816	56

5. Is the person married or single?	Married.
6. A. Has the person resided out of the United States? B. If so, where, and for what period?	A. No. B.
7. Has the person been vaccinated? Yes.	Has the person had the small-pox? No.

8. A. Are the person's parents living; if so, what are their ages and state of health?	Father.	Ages.	State of health, if living.	Age at death.	Cause of death.
				45	Fever sore
B. If dead, at what ages and of what diseases did they die?	Mother.			80	Old age.

	Whole No.	No. Living.	Ages of living.	State of their health.	No. Dead.	Ages at death.	Cause of death.
9. How many brothers has the person had?	5	4	72, 69, 56, 52	Good.	1	28	Fever.
How many sisters?	5	2	77, 58	Very good.	3	36, 62, Infancy.	Child-bed fever, dropsy, small-pox.

10. Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?	No.
261 Have the person's ancestors generally reached old age?	Ages of grandparents. P. G. F. P. G. M. M. G. F. M. G. M.
11. Has the person ever had any of the following diseases or any symptoms thereof? Spitting blood, bronchitis, cancer, consumption, liver complaint, rheumatism, asthma, rupture, fistula, dropsy, insanity, paralysis, apoplexy, gout, fits, piles, bilious colic, palpitation or diseases of the heart, of the urinary organs, or of any vital part. If the person has had any one or more of these diseases, please state particularly which, when, how severe, and whether fully recovered, and answer "No as to all the rest."	No.
12. Is the person subject to dyspepsia, dysentery, or diarrhœa?	No.
13. Has the person ever had an habitual cough?	No.
14. Is the person now subject to or affected by any disease or weakness, or has he had any severe disease, or received any serious injury other than those stated in the foregoing answers? If so, please state the particulars of the same, fully, 262 prefixed by the words "none except."——	No.
15. Are the brain, the nervous and muscular systems, the lungs, heart, abdominal and urinary organs in a healthy state?	Yes.
16. Are the person's habits of life correct and temperate? Have they always been so?	Yes. Yes.

17. Name and residence of person's usual medical attendant.	Have none.
18. Name and residence of an intimate friend, to be referred to for similar information.	Stephen C. Lee, Cameron, Ills.
19. Amount of policy. No. of payments. Kind of policy.	$6,000. Life. Annual. Ord. life. Non-participating. All cash.
20. Is the person's life now assured; and, if so, for how much and in what company? Has the person ever been declined by any company? If so, why? Has any physician ever given an unfavorable opinion of the person's life?	No. No. No.

21. Has the person read and assented to the following agreement? Yes.

263 It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the person is not, and will not become, habitually intemperate, or addicted to the use of opium; and it is hereby agreed, by the undersigned, that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers, any suppression of facts in regard to the person's health, habits or circumstances, material to the risk, or neglect to pay the premium on or before the day it becomes due, shall vitiate the policy, and forfeit all payments made thereon. Such failura to pay, however, shall not forfeit the amount secured by previous payments on a non-forfeiting policy.

(Husband may sign for wife and his own name, as follows:)

JANE DOE,
By JOHN DOE.
JOHN DOE. SILAS GIDDINGS, SR.

Dated this 30 day of July, 1872.

(On left margin page 263:) Approved. Office medical examiner.

(On left margin page 259:) If the applicant is a married woman ask: Is her husband insured? Is he insurable? Has he ever applied and been declined?

Agent's statement.

Have you seen the person herein proposed for assurance and do
264 you know the same to be the one described in the annexed medical examination? Yes.

Is there anything in form, figure, manners, custom, or appearance, which indicates ill health, a feeble constitution, irregular habits or intemperate living? No.

Have you carefully read over the applicant's physician's and examiners' statements, noting whether the age and date of birth agree, or whether there are errors in any of the answers, and have you found them correct, and do you believe them true? Yes.

Do you recommend the acceptance of the risk? Yes.

Dated July 30, 1872.

ROBERTS & HUBBARD,
Agent.

DEAN & PAYNE,
Gen'l Agent.

G.

265 THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

No. 68909. Amount, $6,000. Life of Silas Giddings, sr.

Read this statement with care.

This policy is payable at death of the person insured. Premiums continue during life as follows: $302.52 cash, payable an'l on the 24 day of August. If payments of premium are discontinued at any time after this policy has been in force two years, it can be exchanged for a full paid policy (on which no further payments are required), as stated in the body of the policy, provided this policy be then freed from all indebtedness to the company, and provided also that written application for such exchange be made to this company within six months after lapsing of this policy.

If you change your place of residence, and post-office address, please notify the company immediately.

[20 C.]

Surrender of policy.

18. For a valuable consideration, the receipt whereof is hereby acknowledged, we surrender to the Northwestern Mutual Life Insurance Company the within policy No. .

N. B.—To be signed by the insured and the person for whose benefit the policy is made.

266 *Receipt in full.*

Received , 18 , of the Northwestern Mutual Life Insurance Company dollars, in full of all claims on the within policy.

Agents having the receipts, and them only, will receive the premiums when due or before; but agents are not authorized to waive forfeitures,

to make, alter, or discharge contracts, and no receipt will be binding on the company unless signed by one of its officers and countersigned by the agent.

No agent has authority, in any case, to waive or postpone payments of premium, and the assured is hereby notified that the only evidence to him of the authority of any agent to receive any premiums on account of this policy is a receipt in printed form, signed by the president or secretary of the company.

If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments.

267 The company from courtesy sends notices regularly of the day the premium becomes due, but is not responsible for their not being received. Failure to receive notice is not, therefore, a valid excuse for neglect to pay the premium when due.

(Endorsed:)

Exhibit B, referred to in the deposition of Willard Merrill taken before me on the 10th day of June, 1876, in the suit of Loren Giddings, et al., adm'rs of Silas Giddings, dec'd, against the Northwestern Mutual Life Insurance Company pending in the circuit court of the United States for the northern district of Illinois.

FR. BLOODGOOD,
Special Examiner.

MILWAUKEE, *June* 10, 1876.

268 *Letters of administration.*

STATE OF ILLINOIS,
Warren County, ss:

The people of the State of Illinois to all to whom these presents shall come, greeting:

Know ye that whereas Silas Giddings of the county of Warren and State of Illinois, died intestate, as it is said, on or about the fourth day of September, A. D. 1872, having at the time of his decease personal property in this State, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same.

To the end, therefore, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Loren Giddings and Leander Giddings, of the county of Warren and the State of Illinois, administrators of all and singular the goods and chattels, rights and credits which were of the said Silas Giddings, sr., at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are, or hereafter may be, required of them by law.

269 Witness, Wallace G. Bone, clerk of the county court in and for the said county of Warren, at his office in Monmouth, this 16th day of Sept., A. D. 1872, and the probate seal of said court hereunto affixed.

[SEAL.]

W. G. BONE,
Clerk of County Court.

I, W. H. Sexton, clerk of said county court, do certify that the foregoing are full and true copies of the original letter in my office remaining.

Given under my hand and seal of the said court this 10th day of March, A. D. 1877.

[SEAL.] W. H. SEXTON, *Clerk.*

(Endorsed:) Filed this 16th day of September, 1877, and recorded in book B, page 29. W. G. Bone, clerk.

270 Afterwards, to wit, on the 12th day of June, A. D. 1877, said complainants, by their solicitors, filed in said clerk's office their bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Supreme Court of the United States.

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of Silas Giddings, deceased, *v.* NORTHWESTERN MUTUAL LIFE INSURANCE Company. } In chancery.

Know all men by these presents that we, Loren Giddings and Leander Giddings, of Warren County, Illinois, as principals, and E. W. Giddings and S. Giddings, of the same place, as sureties, are held and firmly bound unto the Northwestern Mutual Life Insurance Company, of Milwaukee, in the State of Wisconsin, in the sum of five hundred dollars ($500), to be paid to the said Northwestern Mutual Life Insurance Company, its representatives, successors or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals. Dated this sixteenth (16th) day of April, A. D. 1877.

271

Whereas the above bounden Loren Giddings and Leander Giddings have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois: Now, therefore, the condition of this obligation is such that if the above-named Loren Giddings and Leander Giddings shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

LOREN GIDDINGS. [SEAL.]
LEANDER GIDDINGS. [SEAL.]
E. W. GIDDINGS. [SEAL.]
S. GIDDINGS. [SEAL.]

Sealed and delivered in presence of—

UNITED STATES OF AMERICA,
Northern District of Illinois:

STATE OF ILLINOIS,
County of Warren, ss:

E. W. Giddings and S. Giddings, the sureties in the foregoing obliga-

tion named, being duly sworn, each for himself, deposes and says that he is a resident of the State of Illinois, and a householder therein, and is worth the sum of one thousand dollars over all his just debts and liabilities, and exclusive of property exempt by law from
272 execution.

E. W. GIDDINGS.
S. GIDDINGS.

Subscribed and sworn to before me this 9 day of April, A. D. 1877.
D. C. GRAHAM,
Justice of the Peace.

STATE OF ILLINOIS,
County of Warren, ss:

I certify that on this 9 day of June, A .D. 1877, before me personally appeared Loren Giddings, E. W. Giddings, and S. Giddings, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same, as their own free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year aforesaid.
[SEAL.] D. C. GRAHAM,
Justice of the Peace in and for said County and State.

STATE OF ILLINOIS,
Warren County, ss:

I, W. H. Sexton, clerk of the county court for said county and State, do hereby certify that D. C. Graham, esq., whose name is sub-
273 scribed to the foregoing acknowledgment, was on the day of the date thereof an acting justice of the peace within and for said county, regularly commissioned and qualified; that his commission was dated May 1st, 1877, and will expire on May 1st, 1881; that as such justice of the peace full faith and credit are, and of right ought to be, given to all his official acts; and that his signature within written is genuine.

Given under my hand and seal of said court, at the city of Monmouth, this 9th day of June, A. D. 1877.
[SEAL.] W. H. SEXTON,
Clerk of the County Court.

STATE OF ILLINOIS,
Warren County, ss:

I, W. H. Sexton, clerk of the county court in and for said State and county, do certify that on this 9th day of June, A. D. 1877, personally appeared before me Leander Giddings, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same, as his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and seal official this 9th day of June, A. D. 1877.
[SEAL.] W. H. SEXTON,
Clerk Co. Court W. C.

274 Approved. H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 12, 1877. Wm. H. Bradley, cl'k.

275 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Loren Giddings et al. are the complainants, and The Northwestern Life Insurance Company of Milwaukee is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 10th day of October, A. D. 1877, and of our Independence the 102d year.

WM. H. BRADLEY, *Clerk.*

Assignment of errors.

Supreme Court of the United States of the October term, A. D. 1877.

LOREN GIDDINGS AND LEANDER GIDDINGS, administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHEASTERN MUTUAL LIFE INSURance Company of Milwaukee.

276 And afterwards came the said Loren Giddings and Leander Giddings, administrators as aforesaid, by Miller & Frost, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in dismissing by its final decree complainant's bill of complaint.

Second. The court by its decree should have granted to the complainants the relief prayed for.

And the said Loren Giddings and Leander Giddings, administrators as aforesaid, pray that the decree aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said decree.

MILLER & FROST,
Attorneys for Appellants.

277 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

LOREN GIDDINGS AND LEANDER GIDDINGS, as administrators of the estate of Silas Giddings, deceased,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURance Company.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the certificate of evidence may be amended by the insertion of the following, viz:

First. Deposition of John E. Dean.

Second. Certified copy of the charter of said defendant.

Third. Application for loan (Exhibit F to W. H. Farnham's deposition).

Fourth. Policy of insurance (Exhibit B to Willard Merrill's deposition).

MILLER & FROST,
Att'ys for Appellants.
HOYNE, HORTON & HOYNE,
Att'ys for Appellee.

(Indorsed:) No. 894. U. S. Supreme Court. 1877, Oct. term. Giddings, adm'r, etc., vs. Northwestern Mutual Life Insurance Company. Stipulation. Amending record. Filed 12 November, 1877. Hoyne, Horton, & Hoyne, solicitors.

(Indorsement on cover:) No. 296. Loren Giddings and Leander Giddings, adm'rs of Silas Giddings, dec'd, appellants, vs. The Northwestern Mutual Life Insurance Company of Milwaukee. N. Illinois C. C. U. S. Filed 13th October, 1877.

FILED
APR 8 1880
D. W. MIDDLETON

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

LOREN GIDDINGS AND LEANDER GIDDINGS, Administrators of SILAS GIDDINGS, Deceased,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, OF MILWAUKEE, WISCONSIN.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF and ARGUMENT on BEHALF of APPELLANTS.

MILLER & FROST,

For Appellants.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

LOREN GIDDINGS AND LEANDER GIDDINGS, Administrators of SILAS GIDDINGS, Deceased,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, OF MILWAUKEE, WISCONSIN.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF and ARGUMENT on BEHALF of APPELLANTS.

A bill was filed in the Circuit Court of Warren County, Ill., by Loren Giddings and Leander Giddings, administrators of the estate of Silas Giddings, deceased, against the Northwestern Mutual Life Insurance Company, to compel that company to perform a preliminary contract to insure the life of Silas Giddings for $6,000, made with him before his death. The case was removed at the instance of the defendant into the Circuit Court of the United States for the Northern District of Illinois, and that court, upon a final hearing, dismissed the bill for want of equity. The complainants have brought the case to this court by appeal, for the purpose of having that decree reversed. Their case is stated

in the amended bill of complaint, commencing on page 16 of printed record. They allege that on or about the 30th of August, (July) 1872, Silas Giddings made application to the defendant company, through the company's local agents in Warren County, Messrs. Roberts & Hubbard, and their general agents for the State of Illinois, Dean & Payne, at Chicago, for a policy upon his life, for the sum of $6,000; that on or about the 30th of July, 1872, the application for said insurance, made in due form, as required by the rules and regulations of the company, and subscribed by said Giddings, was furnished to said local agents, Roberts & Hubbard, and was presented to the general agents of the company for the State of Illinois, Dean & Payne, and by said general agents duly accepted on the 6th of August. That this application was formally acted upon by the company at the home office in Wisconsin, and accepted by said company, and a policy directed to be issued, and that said company advised their general agents, Dean & Payne, thereof, and sent notice thereof to be by them communicated to said Giddings, and that prior to the death of said Giddings, a due and valid contract for the insurance of the life of said Giddings in the sum of $6,000, was made by and between said Giddings and said company. That between the making of said contract and the death of said Giddings, said Giddings was ready and willing at all times, to carry out and consummate said contract. That said Giddings died on the 4th of September, 1872, and that said company did not, prior to his death, nor have they since, offered or tendered any policy of insurance in conformity with said contract, but have refused to carry into effect said contract, and have refused to accept the premium upon said policy, although tendered to them by the administrators of said Giddings, and have wholly repudiated said contract, and denied any duty on their part either to issue said policy or to pay said sum of $6,000.

The bill alleges that said Giddings, at the time he made application for said insurance, also made an application to said company for a loan of $5,000, to be secured upon his farm in Warren County. That this application was also forwarded to and accepted by said company before the death of said Giddings, and that it was arranged between said Giddings and said company through its agents, that in case said application for a loan should be accepted, and also said application for an insurance, the premium to be paid for said policy should be deducted from said money loaned. The prayer of the bill is that the company be decreed to execute the policy and pay the $6,000, or for other and further relief. In the bill an answer under oath is requested, and the defendant is asked to state by its officers what action was had and taken by said company upon said application for said policy, and the exact date thereof, and to give an exact copy from the books and records of said company of said action, and all that appears upon said books and records pertaining thereto.

The answer of the defendant commences on page 9 of the printed record. It says that Silas Giddings by his application in writing, dated the 30th of July, 1872, applied to the defendant for insurance upon his life, in the sum of $6,000—and also by his application made at the same time and of even date, applied to defendant for a loan of $6,000, upon real estate described in said application. That these applications were together, or about the same time, forwarded to the home office in Milwaukee, by its agents, Messrs. Dean & Payne, of Chicago. That the application for insurance was for a policy upon the "non-partici-"pating plan," the annual cash premium upon which payable in advance was $302.52. That said application for insurance was passed upon and accepted by the company, on or about the 24th day of August, 1872, a policy there-

for to be issued by the company. That the defendant caused such policy to be prepared and forwarded to Dean & Payne, and said Dean & Payne were authorized and prepared to countersign and deliver said policy of insurance to said Giddings, provided and upon the condition that the said Giddings would accept the same and pay the premium thereon, in pursuance of the terms of his said application for insurance, but that said Giddings never did so. That the policy contains the following, among other provisions: "This policy shall not take effect and become "binding on the company, until the premium shall be "actually paid during the lifetime of the person whose life "is insured, to the company, or to some person authorized "to receive it, who shall countersign the policy on receipt "of the premium," and the answer says that after the death of said Giddings some person or persons applied to Dean & Payne, stating that Giddings was dead, and offering to pay Dean & Payne money, and requesting Dean & Payne to deliver to such person or persons said policy. Avers that the officers and agents of the company had no right to accept a premium and issue a policy upon the life of a person then already dead. The answer alleges that the following is the entry respecting said policy in the books of said company:

24	Giddings Silas, Sr., farmer, self	Do.	Do. Do. Do. Do. 8 Nov. 1816	56	68909	non-p't'g L. 6,000	A	302.52	302.52	R	C'd Oct. 1872, N. T

which entries signify as follows: The figures "24," 24th day of August, 1872; "Silas Giddings, Sr., farmer, self," the name of the applicant, occupation and the beneficiary; the first "do.," residence previously named under a prior

entry under another policy; the words "do." in the next column, names of the agency and agents, also similar to those in the preceding application; the words "8 Nov., "1816," the date of birth of the applicant for insurance, as shown in his application; "56," his age; "68,909," the No. of the policy applied for; the words "non-p't'ng L," the character of the policy applied for, to be non-participating, life; "6,000," the amount of the policy applied for; the letter "A," shows that the payment of premium is to be made annually in advance; the figures "302.52," the amount of each payment to be made; and the second entry of the same figures the total amount of the annual premium to be paid, in order to put the policy in force and to continue it; the letter "R," that the policy has been received back from the agents; the letters "C'd Oct., "1872, N. T.," canceled October, 1872, not taken or put in force.

Denies that it was agreed by and between said Silas Giddings and any agent or agents of the defendant, that the premium for the insurance, if the application was accepted, should be deducted from any money loaned, or to be loaned, by the defendant to Giddings.

Denies that any agent of the company had any authority to make such an agreement.

Avers that no proof was ever made or furnished to the defendant of the death of Giddings, and avers that the defendant has never had an opportunity to investigate as to such death or as to the liability of the defendant.

EVIDENCE.

The principal witness for the complainants was Peyton Roberts. His testimony commences page 29 of printed record. After establishing the fact that himself and Hubbard were the local agents for the defendant in Warren County, he said that Silas Giddings made application to him on the 30th of July, for an insurance in the Northwestern Mutual Life Insurance Company of Milwaukee, upon his life, in the sum of $6,000. That he filled out the form of the application which had been furnished him by the company. That it was signed by Giddings, also by the medical examiner, Dr. Walker, by Roberts & Hubbard, the company's agents, and that he delivered the application to Dean & Payne, the company's general agents for Illinois, about the 6th of August. That they said it was a good application, and they would forward it at once. That Giddings at the same time made application for a loan of $6,000. That upon being told by the witness that he thought the company would not care to make so large a loan, he replied that he would make the application for $6,000; but if the company would give him but $5,000, it would be satisfactory to him. He says, on page 25, that Giddings did not ask for a corresponding reduction in the amount of the policy in the event that the loan should be reduced. He told Giddings (see page 27), that the premium would be about $300. He says that Giddings asked him (see page 23), when he should be required to pay the premium on the policy, " and I told him he could settle the same when the policy " and the amount of the loan should be delivered. I told " him he could pay it out of the moneys received." He stated to Dean & Payne what he had stated to Giddings, and that it was satisfactory to them; and they said it was customary to collect the premiums at the delivery of the policy. That the company would send a draft, payable to

Mr. Giddings' order, for the full amount of the loan, " and " that I should collect the premium out of him or any other " parties with whom I dealt at the time of delivering " policies and drafts for loans." He says he at the same time delivered the application for the loan to Dean & Payne, telling them what Giddings had told him, that he would be satisfied with $5,000 if he could not get $6,000, on the security offered. That he had been furnished by the office in Chicago with blank applications for insurances and for loans.

This witness says that in the month of September, 1872 (see page 24 of printed record), John J. Glenn, attorney for the estate of Giddings, tendered him the premium on the policy.

John J. Glenn, whose testimony commences on page 32 of printed record, says that in the latter part of October, 1872, he made out proofs of the death of Giddings, and brought them to Chicago on the 12th or 13th of November, 1872, and handed them to Mr. Dean, of the firm of Dean & Payne, and at the same time tendered the premium on the policy. That Dean refused to have anything to do with it; that there was no objection made to the sufficiency of the affidavits, and that he is one of the attorneys for the complainant.

Willard Merrill, a witness for the defendant, and secretary of the company in Milwaukee (see page 74 printed record), says the application was dated the 30th of July, 1872, and a policy issued from the home office on the 24th of August, 1872.

" Q. What do you mean by the policy being issued?

" A. I mean that the medical examiner accepted the " application. The policy was filled in the usual form and " sent to the State agent at Chicago, Illinois." He says it was signed by the secretary and president of the company.

Witness gives a copy of the entries upon the registry of the company, marked Exhibit "A," which is a re-statement of what is contained in the defendant's answer. Says the policy was sent to Dean & Payne, State agents for Illinois, immediately after its date, and that it was returned to the company by these agents in October, 1872. (Copy of the application for insurance, put in evidence, marked Exhibit "D," on page 81 of printed record. (This exhibit is headed, "Application to the Northwestern Mutual Life Insurance Company). An answer to each of the following questions is required from persons proposing to effect assurance in this company which answers form the basis of the contract."

Then follow the questions and the answers filled out.

It concludes with the following statement: "It is here-
"by declared that the above are the applicant's own
"fair and true answers to the foregoing questions,
"and that the person is not, and will not, become habitu-
"ally intemperate or addicted to the use of opium. It is
"hereby agreed by the undersigned that these statements
"of this declaration shall form the basis for the contract
"of assurance, and that any written or fraudulent answers,
"any suppression of facts in regard to the person's health,
"habits, or circumstances, material to the risk, or neglect
"to pay the premium on or before the day it becomes
"due, shall vitiate the policy and forfeit all payments made
"thereon. Such failure to pay, however, shall not forfeit
"the amount secured by previous payments on a non-for-
"feiting policy."

It is dated July 30, 1872, and signed Silas Giddings, Sr. Then follow the agents' statement, which is signed Roberts & Hubbard, agents. Dean & Payne, general agents.

Then follows question to the medical examiner, and answers by him, signed Wm. Walker, M. D., medical

examiner. Then a statement by a friend, signed Guy Stopp, and then succeeds the following statements, probably an endorsement upon the application :

The Northwestern Mutual Life Insurance Company' Milwaukee.
Life proposed, Silas Giddings, Sr.
Occupation, farmer.
Age, 56.
Residence, Floyd Township.
Amount of Policy, $6,000.
Premium, $302.52.
Kind of Policy, ord. life.
How payable, annual.
Agent, B. F. O. Hubbard.
Agents will please fill these blanks.

W. H. Farnam, assistant cashier of the company, was examined on behalf of the defendant, who testified in regard to the application for the loan, who says that the record of the company shows that at a meeting of the executive committee, held at the office on the 4th day of September, 1872, at 7 o'clock, P. M., they voted a loan of $5,000 for 5 years at 10 per cent., to Silas Giddings, Sr., on 154 acres of land in Warren County, Ill., described in his application dated July 30, 1872, and on file in this office. On his cross-examination he says the loan department and the insurance department in the company are entirely separate and distinct, and neither department participates in the act of the other. The witness says he communicated their action to Dean & Payne, the company's insurance agents for Chicago, Ill., and that he did not communicate it to any other person. That they commenced to communicate with the applicant in the beginning of 1873, and did not communicate with him before that time.

J. M. Proeschel, adjuster of claims for the company, testifies, see page 78 of printed record, that the home office received proofs of the death of Giddings from their agents, Deane & Payne. The affidavits are attached, marked Exhibit "4," and found on page 99 of printed record.

George W. Young, stated policy clerk of the company, testifies, see page 79 of the record, that it has been the custom of the company since June 1st, 1871, to keep copies of all policies issued, and the defendant puts a copy of the policy issued to Silas Giddings, Sr., in evidence as Exhibit "J." It is on pages 96, 97 and 98 of the record, is dated the 24th of August, 1872, signed John H. Van Dyke, President, August Taylor, Secretary. The risk commences at noon on the 24th of August, 1872, and is for $6,000—for the term of the life of Giddings, and the annual premium is $302.52.

ARGUMENT.

The complainants' case to compel the performance of the preliminary contract of insurance ought not to be prejudiced by the circumstance that Giddings, when he made an application for this insurance, also made an application to the same company for a loan. The two applications were in writing, and were separate and distinct; each was the subject of a separate contract, there was nothing in either to connect it with the other, and being separate documents, they cannot be connected by parol.

Boydell v. *Drummond*, 11 East, 142.

The expectation of the parties that one would follow the other, did not make them mutually dependent, for the expectations of parties form no part of their contract.

It is only the propositions that were called to the attention of both, and in respect to which their minds met, that can be considered as having entered into the contract; and if the propositions are stated in writing, only those found in the writing can be considered. They can not be even qualified by what was spoken between the parties. When a proposition is in writing, and is clear and explicit, it cannot be made conditional by this species of testimony.

The proposition of Giddings to the Ins[illegible] Company for insurance of his life was of this charac[illegible]t pany duly considered and accepted it. [illegible]n not treat the contracts that respectively [illegible]y applications, as concurrent contracts ev[illegible]h ered the application for insurance the 24th of August, accepted it, sent the policy to their agents in Chicago for them to deliver and collect the premium in the usual course of business. They did this without waiting to see

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The proposition of Giddings to the Insurance Company for insurance of his life was of this character, and the company duly considered and accepted it. The company did not treat the contracts that respectively ensued from ~~their~~ these applications, as concurrent contracts even. They considered the application for insurance the 24th of August, accepted it, sent the policy to their agents in Chicago for them to deliver and collect the premium in the usual course of business. They did this without waiting to see

whether they would accept the application for the loan. They did not even consider that application until some 11 days after. In the policy, they made the risk commence on the 24th of August. They could only do this upon the supposition that the contract for insurance was completed, and the risk taken by the company at that time. The officers of the company undoubtedly supposed that a larger benefit would accrue to the company from the insurance than from the loan; for, judging from the application, it was an exceptionally good risk. They accordingly set out to secure that advantage for the company and postponed the consideration of the subject in which Giddings was perhaps most interested. Had Giddings lived, and had his application for the loan been rejected, the company, upon tendering the policy, could have collected the premium. Had he attempted to defend an action for the premium, upon the ground that the application for insurance was upon condition that the application for the loan should also be accepted, the company would have replied that this condition could not be found in the application for the insurance; that that was an unconditional application, and was so acted upon and accepted by the company, and that at the moment of such acceptance, the risk commenced. The company should be compelled to carry out this contract in the way they understood it at the time; they should be bound in the same sense in which they bound Giddings, and not be allowed to shift their position in view of the event. This would be inequitable and unfair.

There was no such verbal understanding between Giddings and the company.

Witness Roberts says (page 30, printed record): "There " was no agreement between Giddings and ourselves as " to his accepting either the insurance or the loan without the other."

No such defense as this is made by the answer. It is

not even intimated in the answer that the acceptance by the company of the application for the insurance was not to become operative until or unless the application for the loan was also accepted, or that the application or the acceptance of the application for the insurance was made in any such qualified form. It is true the answer contains this allegation.

" That this defendant upon information and belief says " said Silas Giddings did not desire to propose or agree " to accept said policy of insurance and pay the premium " thereon, unless the loan from this defendant to him for " said sum of $6,000 was made and perfected in pursuance " of his said application therefor."

But it is not alleged that this information came to the knowledge of the company before it accepted the application for insurance, or formed any part of the contract between Giddings and the company. This allegation is therefore, wholly immaterial. Besides the allegation is that it was not agreed between Giddings and the company that he would take the insurance if the company rejected his application for the loan. It was not incumbent upon the complainants to prove an agreement in that form. It was enough for them to show that the two applications were placed before the company as separate and independent propositions; and if nothing of a restrictive or qualifying character was said in or accompanied either proposition to the company, then Giddings would be considered as having left to the company the option of determining whether it would accept one or both propositions, and if only one, which one it would accept. Giddings would be bound to carry out the contract which the company chose to make with him, though he did not say in advance that he would carry it out even if the company did not conclude to make the other contract with him. As Giddings was in fact bound by what

the company did, all we ask is that the company shall be bound also.

Dean, a witness for the defendant, says that Roberts, when he presented the applications, said that Giddings did not want the loan unless he could have the whole $6,000, and that he would not take the insurance unless he could get the loan. This Roberts denies. Even if it was permissible to change the contents of a written instrument by proving what was said by the parties, this testimony does not go far enough to be effective in this case. The witness does not pretend that he communicated this fact to the company; he refuses, on his cross examination, to put in evidence the letter he wrote the company when he transmitted the application to the home office, and it is clear from the way the company treated the applications, that they had no such fact as that before them. As the agents of the company had no right to make the contract, and were simply instruments chosen by the company, through whom parties could communicate with it what these agents said to each other, especially if not communicated to the company, can not affect the case; and besides, Roberts never had any authority from Giddings to make such a statement.

In considering the accuracy of the recollection of this witness, and consequently the value of his testimony, it should be remembered that he says (p. 36,) that no proof of the death of Giddings was ever furnished the company.

Proeschel, a Milwaukee witness, (p. 78,) produces the proofs of death, then on file in the company's office, and says they came from Dean & Payne, the agents of the company in Chicago.

This witness, Payne, also says that he don't know whether Dean & Payne received the policy or not (p. 41). It appears from the statements in the answer, and the testi-

mony in Milwaukee, that the policy was sent from Milwaukee to Dean & Payne, immediately after its date, Aug. 24th, and was returned by that firm to the home office in October.

The probable reason why Dean & Payne did not forward the policy to Giddings at once and collect the premium, was their expectation that the loan would be made, and that the premium would be paid out of the loan. No other reason can be given. They retained it until after the death of Giddings, and then refused to deliver it because he had died. They retained it until October, and then returned it to the company. In taking this course they were not acting under any instructions from the company, but upon suggestions of their own, and it is manifest that they were testifying under a strong bias, induced by a desire to prove to the company that this unauthorized service had been very valuable to it.

In the cross-examination of Roberts, counsel for defendant put before the witness an extract from a letter he had written, but which counsel withheld from him, for the purpose of showing that he had made some statement in the letter inconsistent with his testimony. It is a fair presumption that the entire letter would have corroborated his testimony, and that for that reason it was withheld.

It is evident from the whole case that there was nothing left to consummate this insurance contract, so as to give rise to an action at law upon it, but the delivery of the policy and the payment of the premium; acts which the defendant voluntarily chose to delay until after the death of Giddings; and they now interpose this delay as a reason for not paying a risk they had fairly assumed.

Had the acts, the omission of which constitutes the sole defense to this proceeding, been done, an action at law could have been maintained upon the policy. This omission, which has driven the complainants into a court of

equity, is no defense to a suit in that branch of the court.

If ever a preliminary contract of this character was made out, it has been made out by the pleadings and evidenc in this case; nor did the court dismiss the bill, for the reason that it had not been established. The court did not have the opinion filed in the case so as to make it a part of the record. We should be permitted to say, as counsel for the defendant can correct us if we are mistaken, that the court dismissed the bill for want of equity, for the reason that the proofs of the death of Giddings showed that he was taken sick on the 15th of August, and died on the 4th of September, and that consequently, on the 24th of August, when the risk was accepted by the company, he was not in the same state of health as he was on the 30th of July, when he applied for the insurance.

The application was accepted and the risk assumed by the company upon the assumption that the facts stated in the application and the papers accompanying it, were true at the time they were made. That assumption constituted the basis of the contract. The company did not inquire whether the condition of the applicant had in the meantime changed. Giddings was not called upon to make any new statement to the company, for he did not know when the company would act upon his application. It has been held in the case of fire insurance that where a contract of insurance has been made with an agent and the application with the deposit note has been sent on to the office of the company from which the policy is to issue, the company are liable although the loss occurs before the arrival of the letter containing the application.

Palm v. *Ins. Co.*, 20 Ohio, 529.

In the case of *Kohn* v. *The Ins. Co. of N. Am.*, 1 Wash. C. C., 93, the agent applied to the president of the insurance company to effect an insurance on shipboard and settled with him the terms of the insurance, but left the office

before the policy was filled up. It was soon after filled up and executed, and about the same time the company received intelligence of the capture of the vessel and loss which was not known to either party when the agreement was made and the policy executed. On a subsequent day the agent called to pay the premium and receive the policy, but the company refused to deliver it, objecting that the agreement was inchoate, and having heard of the loss before the delivery of the policy, the company had a right to retract, but Mr. Justice WASHINGTON "held that since "there was no unfairness nor knowledge of the loss when "the terms of insurance were settled, the objection was "entitled to no weight, and the contract was perfect and "binding."

This precise question arose in the case of *Ins. Co.* v. *Higginbotham*, 5 Otto, 380. In that case the subject of insurance had presented a certificate regarding the condition of his health on the 1st of October, 1870. It was acted upon on the 14th of October by reinstating his policy which had lapsed, and continuing it in force. During this time a change had taken place in the condition of his health which would have caused the rejection of his application if the company had known it on the 14th of October, the time they accepted it. The company contended that the representation made on the 1st of October was a continuing one and if not true on the 14th, when the company acted upon the application, the contract could be avoided.

It was held by this Court that the representations of the assured as to the condition of his health on the 1st of October, when he applied for the reinstatement of his policy and paid the premium, were not continuous until the 14th of that month.

In discussing this question the court, by Mr. Justice HUNT, who delivered the opinion, at page 383, says: "In

" reaching a conclusion on this point we may notice, 1st " that no inquiry was made of Day, or demand for informa- " tion as to his condition between the 1st and the 14th of " October. The company was particular and specific in " its inquiries as to his condition on the 1st of the month, " required prescribed forms of evidence as to that condi- " tion. There it stopped, neither by expression nor by im- " plication intimated a desire for later information."

The evidence shows that the application was transmitted to and received by the company at its home office as early as the 7th of August. It was the fault of the company that it was not acted upon before the 15th of that month, and it would be extremely inequitable to visit the consequence of this delay upon Mr. Giddings, and thus deprive him of the expectation upon which he had reason to rely, and in his last illness did probably rely, that he had by this means fairly secured what in his estimation was a handsome addition to his estate for the benefit of his children. But for this delay he could have effected an insurance in some other company. As we have already said, it was expressly provided in the application that the facts therein stated, as they then existed, formed the basis of the contract between the parties, and not the facts as they existed at the time the application was accepted. It is not pretended that Giddings was guilty of any fraud or misrepresentation, and to introduce this new element into the case which the parties never contemplated when the contract was made, and which is not even set up as a defense in the answer, would be to change the contract. Besides there was no competent evidence before the court as to what the condition of the health of Giddings actually was on the 24th of August. In the case to which we have referred it was held that the proofs of death could not be used for any such purpose.

AUTHORITIES.

The principles which prompted this suit, and upon which it is based, are clearly stated and expounded in the following cases :

Nearly every question that arises in this case was considered in the case of *Ins. Co.* v. *Colt*, 20 Wall., 560. The court, by Mr. Justice FIELD, at page 567, says: "The law "distinguishes between the preliminary contract to make "insurance and the executed contract or policy, and we "are not aware that in any case, either by usage or the "by-law of any company, it has ever been held essential "to the validity of these initial contracts that they should "be attested by the officers and seal of the company"; and it was there held that where an agreement had been entered into as to the terms upon which a policy should be issued, a court of equity would compel the company to execute the contract specifically, and that where a loss had happened, to avoid circuity of action, the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered its policy properly attested. That the requirement of the charter in regard to the mode in which contracts of insurance should be made, has reference only to executed contracts or policies of insurance by which the company is legally bound to indemnify against loss, and not to those initial or preliminary agreements which necessarily precede the execution of the written or formal instrument by the officers of the company.

In that case the risk took effect on the 26th of August, and the agent of the company gave to the insured credit for the payment of the premium till the 1st of October. The court say, at page 568: "The credit allowed for the "payment of the premium was an indulgence which the "agents were authorized by general usage to give. Its

" allowance did not impair the preliminary contract; that " being valid, could be enforced in a court of equity against " the company; and having been enforced by the procure- " ment of the policy, an action could have been maintained " upon the instrument, or the court, in enforcing the execu- " tion of the contract, might have entered a decree for the " amount of the insurance."

In the case now before the court the premium did not become due until the policy should be delivered. The agent told Giddings, the insured, that it was customary to collect premiums when policies were delivered. It was not really an agreement to delay the payment of premiums in this case, but a suggestion of the agent of the company that it should be delayed. Giddings asked the agent when he should pay the premium on the policy, and the agent told him that he might let it lie until the question of the loan was determined, and then pay it out of the loan.

The agent reported this to the general agents in Chicago, and it is manifest that with this understanding the Chicago agents detained the policy until after action was had upon the application for the loan, and then refused to deliver it because Giddings in the meantime had died.

The following authorities are clear that an agent can waive the condition in a policy, that it shall not be considered as binding until the premium is paid:

Boehen v. *Williamsburgh Ins. Co.*, 35 N. Y., 131.

Wood v. *Poughkeepsie Mu. Ins. Co.*, 32 N. Y., 619.

Sheldon v. *A. F. & M. Ins. Co.*, 26 N. Y., 460.

Bodine v. *Exchange Fire Ins. Co.*, 51 N. Y., 117.

Kelly v. *Commonwealth Ins. Co.*, 10 Bos., (N. Y.) 82.

In *Ins. Co.* v. *Wilkinson*, 13 Wall., 222, it was held that insurance companies who do business by agencies at a distance from their principal place of business, are responsible for the acts of the agent within the general scope of the business entrusted to his care, and no limitation of his authority will be binding on parties with whom he deals, which are not brought to their knowledge, and in that case the doctrine was applied to an instance where an agent had, of his own motion, inserted an untrue statement in the application for insurance.

In *Lishman* v. *Northern Maritime Ins. Co.*, 5 (Moak), Eng. Rep., 278, (8 Com. Pleas, 216): Held, that it is competent to show that the risk was assumed at a time anterior to the issuing of the policy, although the transaction in which the risk was assumed did not amount to a consummated contract, and that in such case the insurer was bound, notwithstanding the thing insured was lost and this loss known to the assured intermediate the time when the risk was assumed and the date of the policy. In *Cory* v. *Patten*, 10 Moak Eng. Rep., 189, the facts were as those in 5 Eng., 278, with the exception that the agent was instructed to get insurance at thirty shillings per ton. He however procured it at 33 shillings per ton, and the insurance was effected subject to ratification by his principal. The principal ratified after the loss but before the policy issued.

In *Bidwell* v. *Astor Ins. Co.*, 16 N. Y., 263, held that although an action at law may not lie upon a parol agreement to complete an insurance by issuing a proper policy, yet if a proper case be made therefor, an agreement to do so will be enforced in equity.

Where an insurance company in the city of New York appointed R a surveyor in Savannah, (Ga.), and by their president empowered him to make contracts of insurance to take effect from the time when the premium should be paid and be received at New York, provided the office

should recognize the rate of premium and be otherwise satisfied with the risk, and R advertised at Savannah the terms on which the company would insure, and subscribed himself as agent of the company at Savannah, mentioning that they would insure through him, &c., and P paid the usual premium on certain goods on the 5th of January, 1820, to R, who gave P a receipt for the money, describing himself as agent of the company, and specifying the consideration and object of the receipt, but before the premium was received at New York the goods were consumed by fire, and P afterwards tendered the premium to the company, and demanded that they should indemnify him or execute the contract of insurance; held, that they were bound to comply, though the premium had not been received by them before the loss. (*Perkins* v. *W. Ins. Co.*, 4 Cowen, 645.)

In *Commercial Ins. Co.* v. *Union M. Ins. Co.*, 19 How., 318; Held, that at the common law a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond or promissory note. A provision in a policy already executed, that no insurance, whether original or continued, should be binding till the actual payment of the premium and the written acknowledgment thereof does not invalidate a subsequent contract by parol to renew such insurance for a premium not paid at the time the risk attaches, but postponed to a future day. (*Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y., 310.,

The case of *Com. Mu. Ins. Co.* v. *Jenks*, 5 Ind., 96, contains all the leading features of the case now before the court. The insured, James P. Jenks, on the 27th of Sept., 1850, made an application to the agent of the insurance company at Lafayette, Ind., for an insurance of $1,500 on his life, for the benefit of his wife. The agent on the same day mailed the application to the company at its home

office. The company approved the application, and the policy was issued thereon and mailed to the agent on the 2d of October. It was received by the agent on the 5th of October. On the 29th of September, Jenks, whose life was insured, was taken sick, and died on the 4th of October, one day before the agent received the policy. The agent returned the policy by mail to the company, [illegible] the insured had died. The company had [illegible] for the first year's premium in advertising it [illegible] lished by the insured. The bill was filed by [illegible] widow of the insured, praying discovery of the entries upon the company's books, &c., and that the original application for the insurance and the original policy issued thereon should be produced, &c., that an account should be taken, &c., and for general relief. It was held that the contract for insurance was completed on the 2d of October, when the application was approved and the policy made. Held that an application for insurance, where the minds of the contracting parties have met upon a distinct proposition made by the one and accepted by the other, chancery will decree its execution, or regarding that as done which ought to be done, chancery will take an account and make such decree as is just and proper from the case made in the bill. In that case the risk was made to commence by the terms of the policy on the 2d of October, 1850. On this point the court say: "This state of facts, as between private "citizens, would not require a word of comment, and "could not induce a moment's hesitation. The insurance "company voluntarily commenced their risk more than "four months before the payment of the premium in the "mode agreed upon could possibly be completed. It does "not lie with the company now to say that the risk had "not commenced at the death of Jenks. Whether it be "regarded as an executed contract, which should entitle "the complainant to the delivery of the policy, or an "executory contract, entitling her to have a policy issued

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" and the damages assessed, the position of the company " is equally untenable. In another view of the case, the " insurance company would be the first to question such a " doctrine. Had Jenks died on ths 4th of *October*, 1855, it " is apprehended the company would have promptly " pointed out this plan to the complainant, viz: that " though the payment of the first year's premium was not " made till the middle of *February*, 1851, yet by the accept- " ance of the terms proposed, and by the terms of " the policy issued, their risk commenced *October* 2, 1850, " and terminated *October* 2, 1855, at 12 o'clock, noon, " precisely.

" It is not good policy in the courts to favor such cun- " ningly devised insurance policies as, that whatever event " happens, the underwriters may reap the premium, and " escape the risk. On the contrary, some degree of " acuteness should be called in to uphold and enforce such " agreements, whenever there has been a fair contract, " and a substantial compliance. Insurance companies are " not favorites of the law. (1 Duer, 118.) In *Mactier* v. " *Frith*, *supra*, it is justly observed, that a refinement which " would distinguish between a contract for insurance and " one for the sale of goods, would, in its application, involve " the courts in distressing embarassments; and distinctions " which are not founded in the nature of things, are not to " be indulged."

In the case of *Walker* v. *Metropolitan Ins. Co.*, 56 Me., 381, Chief Justice APPLETON says:

" A contract of insurance is completed when there is an " assent to its terms by the parties, upon a valuable con- " sideration. Neither the giving the premium note,nor the " reception of the policy of insurance by the insured, are " prerequisites to its consummation. (*Blanchard* v. *Waite*, " 28 Maine, 51.) The acceptance of a written offer to " insure before its withdrawal, completes the contract.

" The acceptance may be verbal, or in writing by the " principal, or his agent. * * * It may be regarded " as settled, that a verbal agreement upon sufficient con- " sideration to issue a policy of insurance, is binding upon " the parties thereto, and may be enforced by a suit at " law. The promise to pay the premium, or give a note " therefor, is a sufficient consideration for the promise to " make a policy."

In *Mobile Marine, Dock & Insurance Company* v. *McMillen & Son*, 31 Ala., 711, held that an action at law can be maintained upon a simple agreement to insure, and that such an agreement cannot be defeated by the peculiar terms of a policy which the company intended to issue, but did not issue.

In *New England Ins. Co.* v. *Robinson*, 25 Ind., 536, there was a verbal agreement to insure, policy to be issued when called for, premium to be paid within five days. Before the five days expired, the loss occurred. Held, that the contract was complete, and binding upon the company.

See also,

Kelly v. *Commonwealth Ins. Co.*, 10 Bosw. (N. Y.), 82.

In *Davenport* v. *Peoria Ins. Co.*, 17 Iowa, 276, a parol agreement for insurance was entered into, and before the policy was issued, the loss occurred. Held, that the company was liable, although the charter of the company directed the manner in which insurance contracts should be made.

Gerrish v. *German Ins. Co.*, 55 N. H., 355.
Goodall v. *N. Y. Ins. Co.*, 25 N. H., 192.
Sheldon v. *Commercial M. L. Ins. Co.*, 25 Conn., 207.
Peck et al. v. *New London Mutual Life Ins. Co.*, 22 Conn., 575.

Loring v. *Proctor*, 26 Me., 18.
Blanchard v. *Wait*, 28 Me., 51.
Palm v. *Medina Ins. Co.*, 20 Ohio, 529.

In *Fried* v. *Royal Ins. Co.*, 47 Barb., 127, it is held that "it is no part of the contract that its binding effect or va- "lidity should depend upon any subsequent act of them- "selves or of their agent in the actual delivery of the pol- "icy so issued to the plaintiff. The acceptance of the "proposition and the premium, the making out and "authenticating a policy and the transmission of it to their "agent, was all the legal delivery of it required. * * * "The defendants were under the implied obligation of de- "livery by virtue of the agreement with the plaintiff to "deliver the policy to her. The transmission of it to their "agent in New York is in contemplation of the terms of "the contract and of law under the circumstances, a deliv- "ery to her."

In *Blanchard* v. *Wait*, 28 Me., 57 and 58, it is said: "A "contract of insurance is complete when there is an assent "to the terms of it by the parties upon a valuable consid- "eration. Neither the giving the premium note, nor the "reception of the policy by the insured are prerequisites "to its consummation. * * * We find then in "this case the terms of the insurance reduced to writing "in a book kept by the insurers for that purpose, and "signed by one of the insurers for the whole; a policy "made and recorded and ready for delivery before the loss. "Was the contract at that time completed? Here was a "union of minds upon the contract. An actual concurrence "of assent at any particular moment is controlling. The "ruling circumstance, the time of consummating it being "comparatively unimportant."

Hamilton v. *Lycoming Ins. Co.*, 5 Barr, 343.

In the case of *Haad* v. *The Providence Ins. Co.*, 2

Cranch, 165, Richard Jackson, President of the Marine Insurance Company, testified that in effecting an nsurance, settling a policy or making adjustment or agreement about insurance, the assent of the parties to doing a thing was in all respects as binding on the parties as the thing done according to the usage and practice among underwriters. This is quoted in 1st Phillips on Ins., p. 10, and note, and it is added:

"And the practice and understanding of insurers gen-
"erally are according to this statement."

In *Taylor* v. *Merchants Fire Ins. Co.*, 9 How., 390., it is said: "The negotiation being carried on through the
"mail, the offer and acceptance cannot occur at the same
"moment of time, nor for the same reason can the meeting
"of the minds of the parties on the subject be known by
"each at the moment of concurrence, the acceptance must
"succeed the offer after the lapse of some interval of time,
"and if the process is to be carried further in order to
"complete the bargain, and notice of the acceptance must
"be received, the only effect is to reverse the position
"of the parties, changing the knowledge of the comple-
"tion from the one party to the other."

When a contract of insurance has been completed by a party applying for insurance, doing all that is required to be done on his part, although the agent contracting on the part of the company, has not power to issue a policy, the risk commences from the time of making such contract, if there be no stipulation to the contrary.

Palm v. *Medina Co. New Ins. Co.*, 20 Ohio, 529.

The facts that an insurance company is bound by its charter to print on the face of its policies all conditions, and that certain officers shall sign all the policies or contracts made, etc., do not prohibit the company from making oral contracts of insurance.

Hening v. *United States Ins. Co.*, 2 Dill., 26.
Sanborn v. *Fire Ins. Co.*, 16 Gray, 448.
Constant v. *Ins. Co.*, 3 Wall., Jr., 318.
Trustees First Baptist Church v. *Brooklyn Ins. Co.*, 19 N. Y., 305.

In regard to the mode in which the company's assent shall be expressed or indicated so as to bind it, Angell, in his work on Corporations, says—Sec. 228: "There are "two general modes in which corporations may expressly "contract. First, by vote; and, secondly, by their duly au- "thorized agents." And in Section 229, he says: "A "distinct proposal made in a corporate meeting and ac- "cepted by corporate vote, would unquestionally consti- "tute a contract binding upon the corporation, and where "the agreement was entered into upon the corporation "books, this seems to have been held even in England"; citing *Maxwell* v. *Dullidge Hospital*, 1 Fonbl. Eq., 296, N. O. (Phil. Ed., 305, N. O.); see *Magill* v. *Kauffman*, 4 S. & R., 317; *Brody* v. *Brooklyn*, 1 Barb., 584.

Says May on Insurance, 55:

"What seems to be necessary is that the acceptance "should be manifested by some act which is open to "the observation of others, and of such a character as "naturally to give rise to the presumption of acceptance "in contradistinction to an equivocal act which might, or "might not, be connected with an acceptance, but would "naturally suggest it. * * * The act, though "not brought to the knowledge of the other party, must "have taken some outward form of expression."

In *Hallock* v. *Com. Ins. Co.*, 2 Dutch, 268, it is said: "A contract arises when an act is done intended to "imply an acceptance of a proposition, whether such "overt act comes to the knowledge of the proposer or "not."

It appears from the answer and proofs, that Giddings, on the 30th of July, made a formal proposal to the company, in which was stated all that the company wished to know respecting the character of the risk they were asked to assume for a life policy. That the company duly accepted this proposal on the 24th of August, and went so far towards the completion of the final contract as to make out a policy upon a basis that the risk commenced on the 24th of August, when the proposal was accepted, signed it by its proper officers, transcribed its leading features upon its records, retained a copy of it in its books, and sent it to its agents in Chicago to be transmitted to the assured through the channel which the company had opened for communicating with him, and this action was not revoked by the company until long after the death of Giddings and the premium had been tendered by his representatives.

A promise is a good consideration for a promise. Both promises are binding, each being a consideration for the other.

1st Parsons on Contracts, 448.

So in this case, a promise to pay the premium is as much a valuable considerstion for a promise to deliver the policy as would be the actual payment of the premium in contemplation of such delivery.

Nothing further was required from the applicant, touching this preliminary contract. It only remained for the company to say whether it would accept this proposal or not. If the subject matter of this negotiation had been the purchase and sale of personal property, and the proposition to purchase had been just as, but no more definite than this proposal, any lawyer would say the contract would be concluded the moment the seller should accept this proposal. No one would pretend that the payment or express promise to pay the purchase money, or any portion of it, was necessary.

This promise would be implied in the proposal to purchase, and the seller, upon tendering the payment, and thus offering to carry out the contract, could recover in an action at law, and the death of a purchaser after a contract is closed, will not prevent the delivery of goods to his representatives. From the moment when the minds of the contracting parties meet, signified by overt acts, the contract is obligatory, although a knowledge of such concurrence is not known at the time to both parties.

Mactier v. *Frith*, 6 Wend., 104–117.

The court say is *Walker* v. *Metropolitan Ins. Co.*, 56 Me., 383:

" A promise to pay the premium is a sufficient consider-
" ation for a promise to make a policy."

In *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw. (N. Y.), there was no express contract or promise to pay the premium, but the court treat the application for insurance as implying such promise, and at page 96 say:

" The payment of the premium after the fire did not af-
" fect the agreement between the parties; by the oral con-
" tract credit was given to the plaintiffs, at least until a
" proper policy should be tendered and such premium de-
" manded." They further say:

" The defendant at that time could have sued him for
" the premium and recovered, and there is no reason why
" the company should not be equally held for the insurance,
" unless upon a tender of the policy and a peremptory de-
" mand of the premium, the plaintiff had refused to
" pay it."

In *Blanchard* v. *Wait*, 28 Me., 51, the application for insurance was signed by one of several joint owners and contained no express promise to pay the premium. The court held that the making of the application implied such

promise, and that the party making it was personally liable for the whole premium.

In *Loring* v. *Proctor*, 26 Me., 18, upon a similar question, the court say at page 30:

"The not giving a note for the premium might be made "to appear unimportant, as constituting only a reiteration "of the promise to pay it contained or fully implied in the "proposition signed by Loring in behalf of the plaintiffs."

In *City of Davenport* v. *Ins. Co.*, 17 Iowa, 289, the court say:

"The contract or agreement to insure is the principal act, "and whether the premium is paid or waived is an imma-"terial circumstance."

It will be noticed that the company formally cancelled this policy on the 2d of October, nearly 30 days after the death of Giddings, and evidenced the act by an entry in their books. On this point the Court say, in the case of *Ætna Ins. Co.* v. *McGuire*, 51 Ill., 347: "Now the ques-"tion arises, if there was no policy in existence, how could "it be cancelled? The very fact of an attempt at cancel-"lation is an admission that there was a policy capable of "being cancelled, and it is not for the company now to "deny it."

That we are entitled to a decree in conformity to the prayer of the bill is we think fully established by the cases above cited.

Some of these cases are upon contracts for fire policies and some upon contracts for life policies; but the rule for determining where the contract arises and when the risk commences is the same in both cases. It is even more important that the risk should commence at the earliest date in a life than in a fire insurance, for the chance for the continuance of human life is not so strong as that for the continuance of property. The rate of the premium

settles this question. Here it is above 5 per cent., while that on fire policies does not commonly exceed 1 per cent.

The case of *Morkey* v. *Mutual Benefit Life Ins. Co.*, 118 Mass., 178, relied upon on the other side in the court below, and which will probably be again cited in this Court, has no bearing whatever upon any question raised in this case. There no one had become responsible to the company for the premium, and there was therefore no consideration upon which to found a preliminary contract. The application was made in the name of Eliza J. Hoyt by James W. Hoyt, her husband. Being under coverture, she could not contract an obligation to pay the premium; and it appears from the case that she did not know of the application until long after it had been made, and hence did not authorize it. The only question in that case was whether what transpired when the sub-agent of the company called upon her and her husband, amounted to a delivery of the policy.

MILLER & FROST,
For Appellants.

OFFICE SUPREME COURT U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

LOREN GIDDINGS, et al., Administrators of SILAS GIDDINGS, Deceased,

v.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Appeal.

BRIEF IN REPLY ON BEHALF OF APPELLANTS.

MILLER & FROST,

Solicitors and of Counsel for Appellants.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
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THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

} Appeal.

Brief in Reply on behalf of the Appellants.

It is proper, if not necessary, that we should reply briefly to the two briefs and arguments just received in this case on the part of the appellee, both in order to prevent misapprehension as to the facts, and to compare views as to the law arising therefrom, to the end that we may correctly present to the court the issues of law and facts upon which the contest in this case arises, so that the entire case may be fairly apprehended and definitely settled by the court of last resort.

We wish in the first instance to correct a few of the numerous errors into which the counsel for appellees have

fallen, unintentionally, of course, in presenting their side of this case.

At page 3 of their first brief they say: "The conditions "attached by this corporation to all policies were printed "and attached to every printed blank application. The "instructions to agents were in like manner attached, and "a declaration that they should not in any case waive or "postpone payments of premiums, nor make, alter or dis-"charge contracts" (Rec., p. 106), and all this "in scream-"ing italics."

And at page 4 they say: "But if it be pretended that "there was any agreement by the agents of this company "contrary to their instructions, the applicant himself, it "will appear, was notified by an article in his blank appli-"cation which he signed, a copy of which is in the evi-"dence (Rec., p. 104), as follows: 'It is hereby declared "'(as the clause reads) by the undersigned that any neg-"'lect to pay the premium on the day it becomes due shall "'vitiate the policy and forfeit all payments to be made "'thereon.'"

The application was put in evidence by the defendant in connection with the deposition of Willard Merrill (p. 75 of the Record), marked "Exhibit D," and is set forth in full on pages 81, 82, 83, 84 and 85, and nothing whatever was attached to or connected with it.

In the testimony of this witness the defendants presented to him the policy that was issued in this case, and marked "Exhibit B," but which was not attached to the deposition (see page 75 of the record), but the defendant agreed to produce the original at the trial, and the defendant was allowed, in connection with the testimony of George W. Young (see p. 79 of the record), to use a copy of this policy as original evidence, marked "Exhibit J," and which is set forth on pages 96, 97 and 98 of the record. There was nothing whatever attached to this policy.

"Exhibit B," which was kept back and produced, we presume, at the hearing, though we do not recollect, is found on pages 100–106 of the printed record, and it seems that to this policy are attached a copy of the application and of the statements of the local agents and general agent, and certain directions to the insured, endorsed upon the policy, but which counsel have treated as if endorsed upon the application for insurance. When these attachments were made to "Exhibit B," the policy that was issued, we do not know, and no information on that subject is furnished by the record. It is certain that they never came to the notice of Giddings.

Counsel say at page three of their first brief: "And "the precise amount of the premium in this case had "never even been stated or agreed upon with the in-"sured."

Peyton Roberts says (p. 27, printed Record): "What "was said was in substance about $300 premium. He "was informed as to what the premium would be"; and upon the application which was signed by Giddings (see p. 85 Record), the exact amount of the premium, $302, was stated.

In their statement of facts in their first brief, they say (page 2): "Mr. Giddings, through a firm in the county "where he resided (the County of Warren, Illinois), known "as Roberts & Hubbard, who were entire strangers to the "defendant did present to the general agents of the cor-"poration at Chicago a request to send them the printed "blanks or applications usually furnished to all who desired "to apply for insurance or the loan of money, and after-"wards, about the 6th of August, 1872, Roberts & Hub-"bard presented to the same agents the two applications in "the bill alleged, signed by the deceased," &c.

And on page three of the second brief they say: "Roberts or Hubbard were not then (6th August), nor

"ever had been prior to that time, the local agents of the "company. They had written to Chicago to Dean & "Payne for blank applications to be filled up for Mr. Gid- "dings, and which, after they were filled up, Mr. Roberts "delivered in person, at Dean & Payne's office, who for- "warded both applications to the home office at Mil- "waukee."

This is a serious mistake, for it conveys the impression that Roberts & Hubbard acted as the agents of Giddings in this transaction, and not as the agents of the insurance company.

Exhibit A (page 26 of Record), shows that on the 25th of July, 1872, Dean & Payne enclosed to Hubbard printed blanks for him to use in behalf of the company, and closing the letter with: "Please write as your Chicago cor- "respondents. Hoping you will be able to do a good "business, we remain respectfully, Dean & Payne."

Roberts, in his testimony, page 21, says that at the time he was a partner of Hubbard, and that he and Hubbard were acting as partners in reference to this insurance business and in other business. Roberts & Hubbard signed the application for this insurance, and recommended the acceptance of the risk to the company, and Dean & Payne did the same thing as general agents of the company. (page 83.) And in this statement Monmouth is spoken of as an agency of the company.

There is no evidence whatever, that Roberts & Hubbard in this transaction were acting as the agents of Giddings, or that they asked the company for any blanks to be used in his behalf. On the contrary, it appears from the testimony of John E. Dean, page 50, that the agency in Chicago on the 25th of July, 1872, sent to B. T. O. Hubbard, at Monmouth, the partner of Roberts, blank applications for insurance and for loans, to be used in behalf of the company in pursuance of an arrangement that they

had previously made with him, and five days after Giddings applied to Roberts & Hubbard, as the local agents of the company at Monmouth, for an insurance upon his life, and the blank application previously sent by the company was used. It was filled out in the usual way, and Roberts & Hubbard signed it as the local agents of the company.

In the supplemental brief we are told by counsel for the appellee, that they "had taken especial pains to make a "candid, full and impartial statement of all the facts, avoid- "ing any expression that anticipated the legal argument "as to whether a valid contract had been made, or any "opinion as to the legal relations which those facts might "be found to establish," and that they "have been sur- "prised at finding in appellant's brief what claims to be a "statement of facts, at variance not only with the record, "but our own apprehension of the entire case."

"It puts forward the unsupported statement of the wit- "ness Roberts as to certain facts about which he was "utterly discredited and contradicted. Instead of stating "the circumstances in detail, upon which it was assumed "that a certain contract in law had been made, the state- "ment is boldly put forward in the facts of the brief, that "a valid contract of insurance was made, and that appel- "lees failed in their duty by the non-delivery of the policy." "We had hoped," they say, "that the labors of the court "might be abridged in this case, by taking the *main* facts "as established, while counsel might argue for the applica- "tion of the law and the construction of the contract," and thereupon counsel proceed to traverse the allegations of facts as we state them, so that the court here may not be misled. Which erroneous recital on our side they proceed to correct by a counter statement on their side, and to which brief review of the statements, to which they take

exception, we have as briefly replied by pointing out the mistakes and errors in their criticism of our statements.

It is possible that counsel may have confounded, to some extent, the recital of the bill contained in our brief with the allegations of the brief in regard to the facts put in evidence. It is, in any event, scarcely to be regarded with surprise or wonder that we should boldly put forward the statement in our brief that a valid contract of insurance was made, which declaration on the part of counsel is underscored, for the purpose, as we suppose, of calling special attention thereto and as being especially astounding.

Upon what ground could we stand for a moment in this case, except upon the ground that a valid contract of insurance was made? If it be conceded by us that no valid contract of insurance was made, the case of course at once falls to the ground, and when we, with great particularity and exactness carefully recite the evidence upon which our statement on this point is founded, it can hardly be properly regarded, we submit, as presumptuous in us, thus sustained by the proof, to emphatically assert a proposition so necessary to our case, especially, when the Judge himself, who decided the case, well nigh concedes the point himself, but for the supposed change in the condition of the health of the insured, just before the acceptance of the application, in saying that "if the condition of health had "continued on the 24th of August, as existed on the 30th "of July, when the application was made, or even if the "defendant had been informed of the change, and had "acted with a knowledge of the fact that the applicant "was then sick, I am not prepared to say but that the "contract would have been complete in equity."

The items of proof upon this subject have been fully and elaborately placed before the court in our brief, of which the counsel so bitterly complain, and as we contend, fully sustain, to the letter, the truthfulness of our state-

ment, and the facts proved upon the trial seem from this statement of the Judge, who tried the case, that but for this supposed implied condition, the contract would be pressed and the case made out, and in such circumstances it is difficult to see any real ground for the astonishment and surprise at making such a bold allegation on our part. If this is not true as we state it, then no case is made out, and there is nothing to talk about.

We understand, of course, that the contract of insurance is as emphatically denied on their part as it is asserted on our part. It is hardly appropriate to talk about discussing the "*main* facts of the case," when this one question is about the whole of the case, without which the case cannot be upheld for a moment, while conceding it to be the actual fact and truth of the case, the whole case is determined at once. The question before the court is not whether the contract has been kept on the part of the appellant, but whether there is any contract at all. It is not so much a question of performance, as the question of whether an actual contract of insurance had been made. If a contract of insurance had actually been made, no one can claim for a moment, that it has been performed by the appellee, or that the money due under the contract has been paid over by the appellee to the appellants, and it is quite important in this case, that the question of whether there was a contract of insurance, should be kept distinct from, and independent of the question of whether that contract has been performed. Confounding these two things inevitably leads to error and confusion in the discussion of this case.

The all-important question, as seems to be conceded in this case, is: Was there a contract of insurance between the parties? As this question is determined so must this case be decided. From the course of the argument hitherto, counsel upon the respective sides differ both as to

the facts and the law. In short, we differ as to what the facts actually are; and, in the second place, we differ as to what the law is upon the facts.

We say that both questions are capable of being definitely determined and ascertained upon the record before the court; and we boldly assert, whether counsel are surprised or not, that the evidence shows a clear case of at least a preliminary contract for insurance, and a clear obligation on the part of the company to furnish a policy of insurance, which was made out at the time of the acceptance of the application, and bears date August 24th, 1872, the date of the acceptance, and was by the company sent to the general agents to be delivered to Giddings, the assured, but which was held in their hands to the day of his death, and returned by the agents of the company to the home office at Milwaukee, instead of being delivered immediately after its execution to Giddings.

We boldly challenge the fullest investigation as to these facts, and insist that this agreement is unquestionably proved, and that the attempt to escape a liability which their own policy unequivocally recognizes and admits, as well as the vote of acceptance of the application and the records of the company proved, must inevitably be futile, and that none of the pretexts by which this liability is sought to be defeated are sustained by the proof.

One of these pretexts is, that Roberts & Hubbard were not authorized agents of the insurance company at the time the application was taken and sent on. When the company seeks to escape obligation upon such a ground as this, if it be satisfactorily shown by competent evidence that the persons whose acts they repudiate are, in fact, the agents of the company, although subsequently repudiated by them, when their liability for the acts of such agents is called in question, then it is a pretty fair inference that this attempt is one of those unfair

and unjust artifices to which insurance companies sometimes resort, but which do not often receive the favor of the courts. We have already referred to the proof on this point, and to the errors on the subject into which the counsel upon the other side have inadvertently fallen. Roberts & Hubbard, the insurance agents with whom Silas Giddings, Sen., the assured, negotiated personally as to the insurance, as appears by their own testimony, acted as agents for the company in July, 1872, and at the time the application for insurance of Giddings was prepared. The testimony of Roberts upon this subject is supported by the letter of Dean & Payne of the 25th of July, 1872, directed to Hubbard, one of the partners, at Monmouth, Illinois. They, the company, send, accompanying said letter, both loan blanks and express insurance blanks, to use as occasion may require in carrying on business and in procuring applications for insurance and loans. Directions are given precisely as any general agents would give to the local agents, and they say, amongst other things, "as far as you "are able, please make your own appraisals, having one "other party join with you; when you are unable to make "your own appraisals, please employ two gentlemen of "integrity and sound judgment to make them. In these "cases you should send letter recommending the ap- "praisers as men of that character. * * * "Hoping you will be able to do a good business, we re- "main respectfully. DEAN & PAYNE." (Page 26 of printed Record.)

The agents' statement, or answers to the inquiries put them, is attached to the application, as required by the rules of the company, and to the question, "At what "agency will renewals be paid?" the answer is "Mon- "mouth," which is signed by "Roberts & Hubbard, "agents," and in the same connection is attached the signature of Dean & Payne, general agents, and the applica-

tion bears date July 30th, 1872, and is found on page 83 of the printed Record.

No other agency for the company, so far as the evidence shows, existed at Monmouth. The subsequent answers, as to the acceptance of the applications, are sent, as they naturally would be, to these local agents at Monmouth. The pretense that Hubbard was not their agent when the application was forwarded by them to Dean & Payne, the general agents, is thus, we see, completely refuted. The company cannot in this way get rid of its responsibility incurred through their agents.

It is, perhaps, not necessarily a controlling question in the case, how far they may be affected by the acts and declarations of Roberts & Hubbard, and their negotiations with Giddings. But whether material or not, there can be no doubt as to the fact of their agency.

Insurance companies cannot shuffle off responsibility in this way, or thus repudiate the acts and declarations of not only their reputed but actually recognized and authorized agents.

We humbly submit that this question of agency does not admit of debate.

This showing can hardly be properly characterized as the unsupported testimony of Roberts.

All that was said by Roberts as to the negotiations with Giddings, moreover, in the office of Dean & Payne, at Chicago, is immaterial, as direct and competent evidence of the facts stated by Giddings. It is a mere recital to them of what was said and done by Roberts. The conversations and negotiations could only be proved by some person present who heard them and had personal knowledge of them. Giddings was not at the office of Dean & Payne at Chicago at any time, and neither Dean or Payne heard anything that he said, nor could his declarations or

negotiations be proved by a subsequent narration made by Roberts to the agents at Chicago. Roberts could swear to the negotiation, and does swear to it, and his sworn statement is evidence in the case; and he denies the version of the transaction attributed to him by Payne, or gives an account of the transaction directly at variance with what Payne swears he told him it was. His subsequent narration of what occurred to Payne is not competent evidence to prove the negotiation, but could only be admissible, if at all, by way of impeachment or contradiction of Roberts; and where Roberts & Payne conflict, as we have already seen, Roberts is supported and Payne contradicted by unquestioned facts.

The negotiations are properly and legitimately proved by Roberts' statement.

His subsequent admissions, by way of narration, to Payne, are not competent, as independent evidence of the facts and statements which occurred during the negotiation between Roberts and Giddings.

The testimony of Roberts, if believed, must exclusively control on that question. And all this talk between Payne and Roberts is incompetent and immaterial, and must be wholly dismissed from consideration, except so far as it may tend to impeach Roberts, and thus impair, incidentally, his testimony as to the material facts which actually occurred, and which he testified to, and which Payne knew nothing whatever about.

So likewise the same criticism will apply to the statement sworn to by Payne, as narrated to him by Roberts, that the insurance was based wholly on the loan, and that if he could not get the loan he would not take the insurance. Payne did not hear Giddings state any such thing, for Giddings was not there in Dean & Payne's office to hear any such statement. According to his story, he merely heard Roberts say that Giddings said this. But

this does not prove that Giddings said this, or made any similar statement, and Roberts swears that he never told Payne any such thing.

And so as to all the matter of the negotiation. It could properly only be proved by the witness that heard it. The fact cannot be proved by showing what that witness said on the subject in his subsequent narration of the transaction. It may show a conflict in the testimony between Roberts and Payne. Both were the agents of the company, but material facts can not thus be proved. The witness must swear to what he personally knows, and cannot testify as to what another person told him. Besides, upon a question of conflict, Roberts' testimony is sustained, while Payne's testimony is in conflict with important facts, especially upon the question of agency.

The position seems to be taken that the contract was entirely dependent upon the loan, so that if the loan was not accepted, the application for insurance was not to be accepted. Both were to be received, or neither.

But at the same time, on page 10 of the appellant's brief, both parties, by their counsel, distinctly concur with the proposition that this was not, and legally could not have been, the contract.

They say that on the part of the defendant "we affirm "the position assumed by counsel for appellants, filed be- "low, that there was nothing in the policy issued, or in "the application, or in any correspondence, indicating that "the policy was dependent upon the loan, but the contrary. "The two things stand entirely distinct from each other, "and the agent at Milwaukee swears that the two depart- "ments were entirely distinct from and independent of "each other, and hence no agent of the company had any "right or authority to attach such condition as is claimed "to the transaction, or to qualify especially by parol the "legal effect of the application, and the conditions of the

" policy issued." Neither the bill nor the argument of the counsel on either side, claims that the loan and the application for insurance had or could have any legal connection with each other, so as to make the contract a joint or conditional or dependent one. They apparently seek to prove this by the witness, Payne, but his testimony does not, and legally cannot prove any such thing; it simply tends to prove what Roberts is supposed to have said to Payne, but which Roberts does not admit that he did say, and amounts to nothing as proof as to what was the actual fact and actual words of the negotiation between Roberts and Giddings.

The counsel however seem greatly confused, and fail to understand why an " arrangement was made as appears " from the bill that in case said applications were granted " the premium on the policy should be paid from the loan, " coupled with the most explicit and oft repeated allega- " tion, that both applications for the loan and insurance " were actually granted."

The explanation is obvious. The bill does not make the applications for a policy, and for a loan, one united contract, although both applications were tendered at the same time. Counsel on both sides agree that they are distinct and independent, and Roberts does not swear that they were dependent, nor that the application for insurance was only to be accepted in case the application for a loan was accepted. But inasmuch as both applications, the one for the policy and the other for the loan, were made at the same time, although appertaining to different departments, and as it was confidently expected by both parties, both by the agents of the company and by Giddings, that both applications would in all probability be accepted, and both probably at the same time, and as this loan fund would be on hand ready for delivery and disposition, it was suggested and ar-

ranged that this mode of payment of premium upon the application for insurance might be taken from the loan. It would be simply a convenient mode of adjusting the payment of the premium due on the insurance policy to the company, and the money due upon the loan from the company to Giddings. This does not make the contracts dependent, or constitute the entire transaction as one contract. If the loan was not successful the premium would still be to be paid when the policy was delivered, and it was quite immaterial from what fund or money of Giddings it should be paid, whether from the loan fund or any other source by Giddings. This was simply a matter of mutual convenience, in point of fact, in adjusting moneys expected to be due under the contract of loan, and also under the contract of insurance.

The contracts nevertheless, as understood by both sides, were separate and distinct, and so regarded in the argument of counsel on either side. Both applications however did prove successful, and both should have been acted upon long before the time when they were formally accepted.

The point is made, however, that the award of a $5,000 loan was an entirely new proposition.

The fact that only $5,000 was voted does not, as the counsel seems to imagine, prove "that the application for the "loan was never granted, but refused." It was distinctly understood and stated, by Roberts to Dean & Payne, when the application for the loan (see page 25 of printed Record) was presented to them, that $5,000 would be satisfactory to him, if that was all the company would care to loan on the security, and the language of the record in the books of the Northwestern Mutual Life Insurance Company, shows that the thing must have been understood, and confirms the statement of Roberts. The language is not that the loan was rejected. The following is the language of

the record: "The following loans were voted in Illinois—"namely: $5,000 to Silas Giddings, Sr., Warren county, "Ills., who applies for $6,000." Had there been no understanding on this subject, and nothing had been stated to the officials of the company to the effect that $5,000 would be acceptable and satisfactory, if no more could be obtained, the record would have read that the application was declined—especially if the absolute and peremptory statement which Payne would have us believe was used, to the effect that he must have $6,000 or nothing, and that no less sum would answer his purpose, and if he did not get that he did not want the policy of insurance. This shows pretty satisfactorily that Roberts was right, and that Payne was wrong, in their respective testimony. If this was simply a proposition to be considered by Giddings, it would have so appeared in the record. There was, however, no occasion for a reply, for this was not the nature of the transaction; $6,000 was desired, yet $5,000 would be accepted, and the minds of the parties, when this vote was taken, met upon this proposition. If, as it is attempted to be shown by the testimony of Payne, it was $6,000 or nothing, there was no occasion for any such entry as was actually made upon the record. The application was simply denied. It is obvious that nothing would have been said about the $5,000, if it had not been already mentioned and understood by and between the parties. The proposal to take the $5,000 had already been accepted before the vote was passed. The two applications, one for the policy and the other for the loan, appear upon the record, and are sworn by the secretary to be entirely separate and distinct, and when adopted were distinct and separate contracts, although for convenience, by way of adjustment, it was suggested and arranged that the premium upon the policy could be taken out of the loan. The two departments, loaning and insuring, were separate and distinct, as Merrill swears and as

all contend,and nobody swears that Giddings either verbally or by writing, made one application dependent upon the other. Payne swears that Roberts so stated to them, but he does not know the fact, and the contrary is testified to by Roberts, and the facts testified to by Merrill tend to confirm the testimony of Roberts. So that, if there legally could be a question of doubt and conflict between Roberts and Payne, it must, upon the evidence, be resolved in favor of the testimony of Roberts.

The counsel for the appellees treat all these transactions between Giddings and Roberts, as the agent of the company, and the subsequent transactions by the company, as amounting only to an inchoate negotiation. This, upon the above recited facts, is a question of law.

If it was necessary that the application for insurance should be not only voted by the company, but the acceptance of the same by the company should be communicated to Giddings before a contract could be made, there might be some plausibility in the position, but we have already, by the most abundant authority, shown that this is wholly unnecessary. That when the application is actually accepted, either by vote or resolution of the company, or in any other unequivocal way, the contract is complete, and both parties are bound; the one to pay the premium, and the other to guarantee the life of the assured, and deliver a formal policy. In the absence of express agreement to the contrary, the delivery of the policy, and the payment of the premium are to be simultaneous acts. Where for mutual convenience a special mode of payment is arranged for, that mode can be adopted. But so far as the question of performance is concerned, no blame can be attached to Giddings. No premium was demanded, and no policy was tendered, and the company re-called the policy, and themselves refused in any way to recognize

the existing contract, much less to carry it into full operation and effect.

The simple question is, was there a fair contract made between the parties? If there was, it was the duty of both parties to stand ready in good faith to carry it into effect. The company has repudiated it without any fault whatever on the part of Giddings or his personal representatives, and the company must abide by the consequences of its repudiation, and its refusal to recognize its solemn obligations.

The court, however, base its decree only upon the single ground of the supposed change in the condition of the assured a few days prior to the vote of acceptance, and distinctly intimate that the contract itself might well be treated as actually made. But that the supposed change in the condition of Giddings as to his health relieved the company from its obligations; that otherwise the contract might be valid, and the claim sustained. But we humbly submit upon the authorities adduced, that such is not the law of insurance, and there is not enough evidence, if it was the law, to establish such a change in the state of Giddings' health as in any contingency to affect the contract. The application for insurance was sent forward on the 30th of July, and must have shortly thereafter reached the home office at Milwaukee, a distance of only 200 or 300 miles from Monmouth, the residence of Giddings. In fact. Roberts swears, that the application was actually delivered to Messrs. Dean & Payne, the general agents of the company, in person, at Chicago, who promised Roberts that they would forward it to the home office of the company at Milwaukee, at once, a distance of only about 80 miles from Chicago, and which could have been forwarded without difficulty on the same day. The company retained the application nearly a month before acting upon it, which

should have been done at once, or with reasonable dispatch.

They ask for no further information on the subject. No false statements are made on the part of the assured, or any fraud committed by him or on his behalf by any one for him. He had a right really prior to the acceptance of the application to presume after such a lapse of time that it was accepted by the company, otherwise some objection would have been made to it. The nature of such a transaction necessarily is to impose upon the company promptness and dispatch. The company have no right to lie by and take the chances of something turning up when they receive application for a life policy. Sickness is liable to intervene, and to make ground not only for delay, but an excuse for abandoning all further negotiation on the subject. And finally without making any further inquiries, or asking for further information, accept the application and send forward the policy dated on the 24th of August, and covering all risk from that date. The law is in such circumstances, we submit, that without fraud in either party the contract is closed and both parties are bound. The proofs of loss, of sickness and death, indicate that on or about the 15th of August Giddings was taken sick. No actual or competent evidence as to the condition of Giddings' health on the 15th or 24th of August is definitely shown. When was about the 15th of August? How sick was Giddings at that date? What evidence is there that the indisposition whatever it may have been, even if known to the company, would have prevented the acceptance of the application, and the issuance of the policy? The application represented the state of facts touching Giddings' health, &c., existing at the date of the application, and could not by any possible construction refer to the state of his health at a future date, or at any time subsequent to the date of the application itself. There is not

the slightest evidence in the case that Giddings had on the 15th or the 24th of August, the date of the acceptance of the application, the slightest apprehension that anything serious was likely to befall him or serious sickness to occur, and much less that he would probably die on the 4th day of October following.

The authorities do not show that any change occurring in the state of a person's health in such circumstances will vitiate a policy, or interfere with the obligation of the company to furnish a policy in accordance with the vote accepting the application and directing a policy to be delivered.

The vote was not only taken, but the policy was actually sent forward to the general agents of the company at Chicago. The assured had the right to presume even before the indisposition, which is supposed from the proofs to have occurred on or about the 15th of August, 1872, that he was secured by his insurance, and that it would come around in course of time. And now the company after keeping the application nearly a month, and then accepting the application and sending on the policy, after hearing of the death of Giddings, all at once wake up to the discovery that they are released from their obligation by the death of Giddings, the very event against which he was insured. The counsel for the appellee seem to place much reliance upon the fact that a policy under the rules could not take effect until the premium was actually paid.

In two distinct cases, at least, referred to in our brief, this court has already passed upon the question that this provision does not apply to the preliminary contract to deliver a policy, and to insure the party, and this, too, although in these cases, in the most explicit manner, provision was made that the policy should not take effect until the premium was paid, and that such a defense was in those circumstances utterly unavailing.

The technical objection is also made that the rate of premium was not agreed upon, and, therefore, the contract was incomplete. The authorities cited show that even this is immaterial. That in the circumstances which have occurred here, where nothing special is said as to the rates, the customary rates are presumed to be assented to and agreed upon. Unfortunately, however, the amount of premium was talked of and assented to by Giddings at the time of the application (Printed Record, p. 31), and upon the application, as appears from page 85 Printed Record, the precise amount of the premium was stated at $302.52. All these subterfuges can be of no avail to the appellee. Broader and juster grounds must be found before the company can be relieved from its liability. A case of this magnitude cannot be decided upon mere crochets or technicalities. Whatever artifices insurance companies may resort to to escape liability, higher considerations are supposed to control, and do control, the action of our courts in passing upon the rights of the parties. The controlling facts standout in bold relief. Giddings sought to be insured, and to receive indemnity from the possible loss which his death might impose upon his family. The company held itself out as an insurer, and agreed to furnish this indemnity; and Giddings, on the other hand, agreed to pay the premium. It was not essential to the liability that the premium should be paid, or the policy delivered. It was enough, under all the authorities, that the premium was agreed to to be paid, and that the Insurance Company, in case of the death of the assured, in consideration therefor, should pay the stipulated insurance money in consideration for the premium agreed to be paid. Under such a contract, natural justice, as well as established law, hold both parties liable, and must require the company to meet its obligation, and pay over the insurance money in case of the death of the insured. Any other construction would create

a monstrous fraud, and make the entire community, who sought for insurance for themselves and their families, victims of chicanery and artifice, if not of absolute crime.

The appellant claims that the defendant, the Northwestern Mutual Life Insurance Company, is liable to the administrators of the estate of Silas Giddings for the $6,000 insurance proposed in Giddings' application to the company, taken by the local agents at Monmouth, on July 30th, 1872, forwarded to the general agents at Chicago, and the first, if not the only serious question involved in the case is whether there was a valid contract of insurance between this company and Silas Giddings at the time of his death. That there was such a contract, we say, is obvious from the fact that there was a proposal on the one side formally and fully made in writing, and unconditionally and unequivocally accepted by the other.

It is an *elementary* rule of law that a proposition made by one party to another party, and accepted by the latter, constitutes a contract. It is quite immaterial whether it relates to a life policy of insurance or a fire policy, or the sale of grain or any other personal property, or whether it relates to the employment by one party of another, the rule is the same. It is a rule of universal application in reference to contracts, unless the contract be forbidden by law, either absolutely or in the form and manner of its execution. In this case the written proposal is proved. There is no question about it. It appears from the testimony on both sides, and a copy of the same is embodied with the depositions taken on the part of the defendants. The acceptance is distinctly admitted as well as unequivocally proved. It is admitted in express terms in the answer, and it is also proved by the testimony of Merrill, the agent of the company at Milwaukee, and by the records of the general office there, and by the telegrams and letters of the

general agents. There can be no question of dispute as to the fact of the proposal and the acceptance.

From these facts the *law conclusively presumes a contract.*

The only escape from liability on the part of the company is to disprove the facts or overturn the law, adduced to show that the contract is presumed from the facts proved.

Taylor v. *Merchants' Fire Ins. Co.*, 9 How., 390.

Commercial Mu. Ma. Ins. Co. v. *Union Mu. Ins. Co. of N. Y.*, 19 How., 322.

Kentucky Mu. Ins. Co. v. *Jenks*, 5 Ind. Rep., 96; reported in 1 Bigelow, 101.

Fried v. *Royal Ins. Co. of Liverpool*, 47 Barbour, 127, reported in 1 Bigelow, 588.

It is not necessary to the completion of the contract that the claimant should have been made acquainted with the fact of the acceptance of the proposal by the company. This is decided in

Fried v. *Royal Ins. Co.*, 47 Barbour, 127.

Kentucky Ins. Co. v. *Jenks*, 5 Ind., 96.

and in

Taylor v. *Merchants' Fire Ins. Co.*, 9 How., 390. And in various cases above cited.

Nor is it necessary that the premium should be paid. It is enough that it is promised to be paid. This last point is decided by the Supreme Court of the United States in the case of the *Commercial Mutual Marine Insurance Company* v. *Union Mutual Insurance Company*, 19 Howard, 318–322, 323, referred to above, which is binding and authoritative upon this court.

The language of Justice CURTIS is: "Nor do we deem "it essential to the existence of a binding contract to make

" insurance that a premium note should have been actually " signed and delivered. The promise of the plaintiffs to " give a note for the premium was a sufficient considera- " tion for the promise to make a policy. It is admitted " that the usage is to deliver the note when the policy is " handed to the assured. If the defendants had tendered " the policy, we have no doubt an action for not delivering " the premium note would have at once lain against the " plaintiffs, and we think there was a mutual right on their " part, after a tender of the note, to maintain an action for " the non-delivery of the policy."

The same case decides that the statute of Massachusetts, requiring countersigning of the policies, etc., applies only to the formal policy itself, and also that a proposal by one side and acceptance by the other, though no policy be executed, constitutes a valid contract of assurance, and this, too, notwithstanding the construction put upon the transaction by the officers of the company by their answer, which stated in reply to a special interrogatory that the company's " president did assent to the terms " and provisions in said paper (that is the application) as " the terms and provisions of a re-insurance, to be com- " pleted and executed by this defendant by the making " and execution of a policy in due form, and the by-laws of " this defendant, but they were not assented to as a present " insurance." The court, however, did not adopt this construction, but held that there was a valid contract between the parties for present insurance. Upon both of the points, therefore, involved in this question of whether there was a valid contract, we have the conclusive authority of the Supreme Court of the United States, whatever may be the decision of the courts of Massachusetts or of any other State; although the view thus announced by the Supreme Court of the United States is sustained by the decisions of

the Supreme Courts of various States of the Union in this regard.

Fried v. *Royal Ins. Co.*, 50 N. Y. Rep. Court of Appeals, 243, affirming the decision in 47 Barbour, 127, above referred to.

Trevoir v. *Wood*, 36 N. Y. Court of Appeals, 307.

This case of *Fried* v. *Royal Ins. Co.* seems to dispel the illusion of such a transaction as the one at bar, being an open incomplete negotiation, or one to be taken subject to the condition of continued good health on the part of the applicant.

The language of Chief Justice CHURCH, in delivering the opinion, on page 248, is:

"If accepted, the risk of an unfavorable change of "health after that time was necessarily assumed by the "company. Even death before the receipt of the decision "of the company was expressly assumed by it. The as- "sured took the risk that the application was in the pre- "scribed form and presented a proper subject for life in- "surance at that time. Not that the nominee would con- "tinue in such a state of health as to be acceptable to the "company for an indefinite period. The company was to "act upon the papers presented, and they related to the "condition of the nominee at the time they were prepared. "If the papers presented showed a proper case for insur- "ance, the risk of rejection by the company was very "slight, while the risk of the health of the nominee for "one, two or six months might be very serious."

In the case at bar, although the premium was not paid, it was agreed between the applicant and the agent, that it should be paid when the policy was delivered, and the cases cited from Maine reports, 26 Maine, 18, *Loring* v.

Proctor, 28 Maine, 51, *Blanchard* v. *Waite*, hold that an agreement to pay the premium is implied in law from the application itself.

The premium too was agreed upon, and even if it was not specifically stated, the decisions cited on the argument, show that the application itself fairly implies a promise to pay according to the *customary* or *established rates.*

This was a contract for *present* insurance. When the proposal is made by one and accepted by the other party, the necessary legal result is that the contract takes effect at once, unless there is an express condition to the contrary. The liability is mutual. The one party is obligated to pay the premium, and the other party is bound to indemnify against prospective loss. The policy too bears date the day of *acceptance*, and calls for the annual payment of premium on the 24th day of August in each year. Had the policy been delivered the applicant would have paid the premium upon a risk commencing upon the 24th day of August, the date of the acceptance. The company, as the policy shows, expected to collect the premium from the time of the acceptance to the time of the delivery of the policy. The doctrine of the company seems to be that there was a good enough contract to collect premium on from the date of the acceptance to the date of the delivery of the policy, but it was utterly worthless to protect the party who is to pay the premium for the risk during the same period. This is mutuality with a vengeance. This is what is regarded as even-handed justice. That while a man receives no protection from the risk whatever, from the date of the acceptance to the time of the delivery of the policy, he is nevertheless expected and required to pay the premium for being insured for this period.

The date and terms of the policy show conclusively that the applicant was to pay for a risk commencing from the 24th of August, the date of the acceptance, and the com-

pany cannot be allowed in law or justice to deny their liability for the loss which might occur during the time that might elapse from the date of the policy and acceptance to the time of the delivery of the policy.

If Giddings was to pay the money for the risk during this period, then assuredly the company was to assume the risk, and incur the liability therefor for the same period. Any other conclusion involves injustice and absurdity.

We have then in this case:

First. A proposal.

Second. An acceptance.

Third. The terms fixed, and the premium agreed on.

Fourth. The intention of the company to take the risk from the date of the acceptance, the 24th of August, clearly indicated by the terms of the policy itself, in full confirmation of the agreement testified to by Roberts and confirmed by the letters and telegrams of the general agent. It is said that the construction contended for by the counsel for plaintiff operates harshly upon the company. To this we reply that any other construction would be unjust and severe upon the complainant. The construction of this transaction which we claim, is not only sustained by the law, but is in full accordance with the custom and understanding amongst underwriters. The whole philosophy of insurance and of actual practice upon the subject is in accordance with this view. The object of insurance is protection to the claimant against loss or the risk of death.

The application bears date the 30th of July, when it was delivered to the local agents of the company at Monmouth. It was nearly a month after this time before it was acted upon by the company. After the acceptance of the application and the issuing of a policy it remained in the hands of the company or of their general agents at Chicago for

some ten days longer, and until the death of Giddings, and then, instead of being delivered to his representatives, it is sent back to the home office and canceled. When the whole transaction, in the ordinary course of business, ought not to have occupied at the farthest over a week or ten days, over a month actually elapsed from its inception to its close, and in the meantime sickness supervenes, the applicant is deprived of all power to obtain insurance elsewhere by the condition of his health, and is left—if the position of the company is to be sustained—unprotected and uninsured, and deprived in the meantime of all power of protection, simply for the accommodation of the company. This is unreasonable. Such a delay as this, if it is to operate to prevent the completion of the contract, and suspend indefinitely or prevent the attaching of any liability upon the company, is intolerable, and puts every applicant for insurance at the absolute mercy of the insurance company, even after it has not only had full chance for examination and made no objection to the application, but after the company has expressly accepted the application. The fair understanding is that when application is made for insurance, especially a formal application in writing, if it is unobjectionable on its face and honest and true in its statements, that the applicant shall certainly receive his policy. There is no condition or contingency about it, except that the company reserves the right to determine for itself whether the application comes up to their established rules and requirements, and whether for failure to meet the same they will reject the application. If they do not reject the application, the party should be deemed insured; and where the company expressly accepts the application, all doubts are resolved, and the company is, after that, absolutely bound to deliver the policy.

If, when the policy is presented for delivery, and payment of premium demanded, it is refused, the company may, at

its election, either sue for the premium or rescind the contract for refusal of the applicant to carry out its provisions on his part.

The case of *Markey* v. *Mutual Benefit Ins. Co.*, 118 Mass., 178, cited by the defendants' counsel, is claimed to be in conflict with this position. The answer to this is twofold: 1st. If it conflicts with our position it equally conflicts with that of *Com. Mu. Ma. Ins. Co.* v. *Union Mu. Ins. Co.*, 19 How., 322; and the latter authority is controlling as the authoritative utterance of this Court.

The Massachusetts case is, amongst other things, clearly distinguishable from this in the important fact that there the company presented the policy and demanded payment of the premium, and the premium was never in fact paid, although demanded. In that case the company had discharged its duties, and performed the contract by tender of the policy. The applicant having had a full opportunity to receive the policy and pay the premium, and having neglected to do so, could after that have no claim against the company for a specific performance of the contract for a delivery of the policy. If the reasoning of the court in that case goes any farther than this, and conflicts with our position, it is erroneous, and in clear conflict with the decision of the Supreme Court of the United States, and hence cannot properly control the decision of this case.

Nor is there any defense established upon the ground that the arrangement for a life policy was conditional upon the success of the loan. For the following reasons:

First. The allegation that the policy was conditional upon the loan is not in the bill, nor is it proved. It is true it was suggested and expected, and, as the amendment to the bill has it, " it was arranged " that the premium could be paid from the loan. But it was wholly immaterial, so far as the company was concerned, whether it was paid

from the loan or not, provided the company got its money. The material fact for them was payment of the premium from any source. That was all the company was entitled to. The mode of payment did not concern them.

Second. The loan asked was actually voted, and whether $5,000 or $6,000, was immaterial. Giddings had agreed to take either, when the suggestion was made to pay the premium out of the loan.

Third. A party may waive a condition for his own benefit. Giddings might let the condition go, if condition it was, and at once tender the premium without waiting for the loan, and the company would have been obliged to have accepted it.

Fourth. If a condition is to be interpolated into the contract, the whole of it must go in. This condition or arrangement between Giddings and the local agents was to pay out of the loan, whether $5,000 or $6,000 was voted. This is all the condition proved, and this is testified to by Roberts. If this alternative alone is struck out of the arrangement for life policy and separated from it, then the rest of the condition must go with it. If all the condition is struck out, then there remains only the written application, and the agreement to pay the premium on the delivery of the policy, which agreement is also implied in the application itself.

The attempt of Dean & Payne to make out an express condition by their testimony to the effect that the life policy was dependent upon the loan, must go for nothing.

First. For the reason that they made no such agreement or condition with Giddings, nor is it to be found in the written application. Their statement or construction of what Roberts said to them does not bind Giddings, so long as Giddings never authorized such an arrangement, and so

long as neither Dean nor Payne saw Giddings, and hence could not testify, nor did they testify, that they heard Giddings make such arrangement or authorize such arrangement, and Roberts swears expressly that no such arrangement was made.

He also swears that he told Dean & Payne that he had said to Mr. Giddings that he could pay the premium when the policy was delivered and take it out of the money loaned, and this latter statement Payne does not deny. Though Payne's evidence may be admissible to contradict Roberts as to any conversation between Roberts and Payne, it is utterly incompetent to establish the fact of what took place between Roberts and Giddings, and of what condition and arrangements were made between them in an interview at which Payne was not present, and of which, therefore, he knew absolutely nothing at all.

Second. All the facts as shown by the testimony in Milwaukee tend to confirm Roberts, and overthrow the testimony of Dean & Payne as to every point, wherein Roberts differed from Dean & Payne.

Fifth. The official action of the company shows the policy was not dependent upon the loan. There is nothing in the policy which the company issued or in the application, or in the correspondence in the matter indicating that the policy was dependent upon the loan, but the contrary, and the two things stand entirely distinct from each other, and the agent of the company at Milwaukee expressly swears that the two departments were entirely distinct from and independent of each other, and hence no agent of the company had any right or authority to attach any such condition as is claimed to the transaction, or to qualify, especially by parol, the legal effect of the unqualified written application, and unconditional policy issued thereupon by the due authority of the company.

The proposition that the provisions of the charter or by-laws requiring pre-payment of premium, countersigning of policy, etc., etc., applies only to the formally executed policy, and not to the preliminary contract for a policy, is emphatically sustained by the case of *Insurance Co.* v. *Colt*, 20 Wallace, 560. An authority which is controlling, and authoritative upon this court, irrespective of any decisions which may have been made elsewhere to the contrary. The 8th section of the charter of the Insurance Company in that case, found on page 561, gave "full power to make "insurance against losses by fire," and "to make, execute "and perfect such and so many contracts, bargains, agree-"ments, policies and other instruments as shall or may be "necessary, and as the nature of the case shall or may re-"quire, and every such contract, bargain, agreement, and "policy to be made by said corporation shall be in "writing or in print, and shall be under the seal "of the said corporation signed by the president, and at-"tested, and signed by the secretary, or other officer, who "may be appointed by the president and directors for that "purpose."

Notwithstanding this explicit requirement of the charter, the Supreme Court of the United States held that it had "reference only to executed contracts or policies of in-"surance," and Justice FIELD, who delivered the opinion, further uses the following explicit language on this point, namely: "The law distinguishes between the preliminary "contract to make insurance or issue a policy, and the ex-"ecuted contract or policy. And we are not aware that "in any case either by usage or the by-law of any com-"pany, or by any judicial decision, it has ever been held es-"sential to the validity of these initial contracts that they "should be attested by the officers and seal of the "company. Any usage or decision to that effect would "break up or greatly impair the business of insurance "as transacted by agents of insurance companies."

The opinion further cites with approval, various cases of parol preliminary contracts which were held good, including the case of *Cone* v. *The Insurance Company*, 1 Washington's C. C. Rep., 93, cited on the argument, which were held to be valid although the requirements of the charter or by-laws as to contracts for insurance were not followed, and where, as in the case last cited, there was neither prepayment of the premium nor a note given therefor. The court holding that these requirements had no application to the preliminary contract of insurance, and did not affect its validity in the slightest degree.

MILLER & FROST,
For Appellants.

OFFICE SUPREME COURT U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

LOREN GIDDINGS, ET AL., ADMINISTRATORS OF SILAS GIDDINGS, DECEASED,
v.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

APPEAL.

BRIEF AND ARGUMENT FOR APPELLEE.

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Of Counsel for Appellee.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
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APPEAL.

STATEMENT.

The bill in this case was filed by the appellants as the legal representatives ot one Silas Giddings, deceased.

The bill was filed as a bill for *specific performance* upon two distinct and several grounds. It is claimed by appellants that at the time of his death Silas Giddings, deceased, had entered into and concluded TWO SEVERAL CONTRACTS with the defendant. The defendant in this case is a life insurance corporation, created by the laws of Wisconsin, with its principal place of business, or home office, in Milwaukee. In July, 1872, the corporation was also doing a life insurance business in Illinois, where Mr. Giddings resided, and in which State the corporation made occasional investments, by way of mortgage on

land, of the surplus funds which it had accumulated in the progress of its business.

The case of plaintiffs, as made by the bill, is, that the deceased, Mr. Giddings, in July, 1872, having made two several applications to the insurance company—*one* for an *insurance* policy upon his life for $6,000, and the other for a loan of $6,000; these applications were *accepted* by the company, and at the time of his death in September, 1872, they had become *valid contracts*, a legal conclusion which the answer of defendant *totally denies*, and in which conclusion the defense was supported by the decree of the court below dismissing this bill.

THE FACTS.

For the appellees in the case we think, as the record will show, that no legal or valid contract of any kind was ever made.

The negotiations that had been initiated by Mr. Giddings were still pending at his death.

It is true, as stated, that on or about the 30th day of July, 1872, Mr. Giddings, through a firm in the county where he resided (County of Warren, Ill.,) known as *Roberts & Hubbard*, who were entire strangers to the defendant, and who never had any authority as agents of this company, did present to the general agents of the corporation at Chicago a request to send them the *printed blanks* or applications usually furnished to all who desired to apply for insurance or the loan of money; and afterwards, about the 6th of August, 1872, Roberts & Hubbard presented to the same agents the two applications in the bill alleged, signed by deceased; one asking for a loan of $6,000 upon a pledge of certain land as security, and one for an insurance of $6,000 upon *his own life*, which

blanks were at once *forwarded to the home office at Milwaukee* by the said agents at Chicago.

On or about the 24th day of August, 1872, the officers of the company at Milwaukee considered the application *for insurance*, and ordered a policy made out and sent to the general agents at Chicago (Dean & Payne), where it remained up to the death of Giddings on the 4th of September, afterwards. It is admitted that no premiums had been tendered or paid during his life, nor was there ever any demand made for the delivery until after his death.

It will *not be denied* that it is a *fundamental condition* of all contracts made by this company that no delivery of a policy is to be made by the *agents, under their instructions*, to any person insured, *before the payment of the amount* "*of* "*premium charged, or agreed upon between the parties.*" And the precise amount of the premium in this case had never been even stated or agreed upon with the insured.

The conditions attached by this corporation to all policies were *printed and attached* to every *printed blank application.* The instructions to agents were in like manner attached, and a declaration that they should not "*in any case waive or postpone* PAYMENTS OF PREM- "IUMS, *nor make, alter, or discharge* contracts." (Rec., p. 106.) Every policy, of which the one issued is a copy, contained also the express provision as a substantive part of the body of the *contract itself*, "*that the policy* "*should not take effect*, or *become binding* on the *company*, "until *the premium was first actually paid*," and that, too, during the lifetime of the person whose life was assured "to some person authorized to receive it, who should coun- "tersign the policy."

The policy in this case never passed from the *hands of the agents* of this corporation, to *whom it was sent*, TO BE DELIVERED upon *these conditions.* But it transpired, soon

after its receipt in Chicago, that when the policy was issued from the Milwaukee office on the 24th of August, ten days previously, on or about the 15th day of the same month, *Giddings, the applicant, had been stricken down with acute pleurisy, of which he died on the following 4th day of September, 1872.*

This *change in the condition* of the *subject matter of the proposed contract, i. e.*, the change of health in the applicant, was never made known to the company by any one connected with deceased; and the fact itself was not ascertained by the defendant until sometime after the policy itself issued *on the 24th of August.* The company acted in *complete* ignorance, on the 24th of August, *of this change.*

But if it be pretended that there was any agreement by the agents of this company, contrary to *their instructions*, the applicant himself, it will appear, *was notified* by an article in his blank application, which he signed, a copy of which is in the evidence (Rec., p. 104,) as follows:

"It is hereby declared (as the clause reads) by the "undersigned that any neglect to pay the premium on or "before the day it becomes due, shall vitiate the policy, "and forfeit all payments to be made thereon."

But *more than this!* the public law of the State of Wisconsin; the charter of this corporation itself; affecting with notice all persons entering into contracts with it, declares, (Rec., p. 88):

"SEC. 4. That every person effecting any insurance "with the company, thereby becomes a member of the "corporation. As a member he becomes entitled to share "in its earnings as well as participate in its losses."

And "SEC. 7," declares, (Rec., p. 86), that the *first* time any person becomes a member of this corporation by effecting insurance therein, "*He shall, before he receives* "*the policy*, PAY *the rates that shall be fixed upon* and *de-*

" *termined* by the *Trustees;* and no *premium so paid* shall " ever be withdrawn from said company; except as there- " inafter provided, and shall be liable to expenses and losses " incurred by the company during the continuance of its " charter."

It would seem, therefore, that *payment of premiums*, in all such cases, was a *condition precedent*, and made so by charter, and the fundamental law of the corporation, which the trustees could *not set aside*; but of which all applicants for membership, as well as all agents, were advised.

Irrespective of other stipulations, the law itself entered into and was made part of the contracts between the parties.

This law was a limitation upon the exercise of powers granted in the charter on behalf of the large constituency, including the thousands insured, for whom the trustees of the corporation act.

The counsel of appellant very strangely insist, that when this policy was made out by the officers, it amounted to an *unqualified acceptance* of the application, losing sight of the conditions imposed upon all persons by the letter and spirit of the entire transaction.

The policy in this case was retained under control of the company in the hands of its agents, until Giddings should perform the condidion. The policy changed place from Milwaukee to Chicago, just the same as it might have done in *the home office*, by a change of the same paper from *one desk or office*, to another desk or office, of which counsel say they had no knowledge.

The change was made for the convenience of *delivery*; should the applicant conclude to meet the conditions, he could have given effect to the contract by *paying the premium at Chicago.*

But the *main condition* upon which this contract de-

pended, for any force or vitality, was never complied with, by deceased.

It is important to note that in the blank form of applications for insurance—a copy of which deceased sent filled up—not only is the condition of applicant's health set out, but the other conditions required to be observed by the applicant. The applicant made such *representations*, corroborated by the agents, that the company was assured that his life would run during the average period assigned by the tables of mortality to men of the same age, possessing a sound constitution. Two medical examiners, one of whom was the physician of Mr. Giddings, certified, that he was of healthy condition, and of such habits and circumstances, as to render his life *safely insurable*. (See Record, p. 84.)

And with these certificates, there was also a prescribed statement of the friend of Mr. Giddings, who stated that he had personally known him for five years, that he was *then in good health*, has no *constitutional infirmity* to make his life more than usually hazardous.

THE APPLICATION FOR THE LOAN OF $6,000.

We now come to the loan. The record shows that the application in that case, also, was a *printed blank* furnished from the office in Chicago. It was filled up by a description of the land offered as security, the appraised value and nature of the improvements, incumbrances if any. A copy was introduced in evidence, (marked Exhibit F, attached to the deposition of W. H. Farnham).

In this application we deem it material to call attention to what is required as preliminary to the consummation of the loan on the part of every applicant. Among the conditions will be found one—that *titles* to the *property*, are to be examined; and the securities prepared at the expense of the applicant. "Also that a complete and acceptable

" abstract is to be furnished, and other evidences of title, as " may be necessary," &c., &c. This last clause of the application is directly over Mr. Giddings' personal signature.

The record also shows besides, what ordinary prudence and business dealings require in the making of money loans, and how carefully the charter and by-laws of the corporation itself regulate that entire subject.

It is thus provided (1) that before any money is paid out for loans, that the following securities and documents must be lodged with the president, duly certified by counsel to be valid and correct. (2.) The bond is to be delivered to him, and the mortgage or other securities are to be left to be duly recorded in the proper office. (3.) The abstract of title and searches are to be continued, down to the date or time of the recording and execution of proper instruments.

These conditions are so enforced, that agents and officers of the institution have special instructions in all cases. Inasmuch as the bill in the case alleges that Mr. Giddings made his application to authorized agents of the company, it is to be presumed that in connection with his printed application, deceased was fully advised of the requirements made by the company, and he could not have hoped to conclude a loan before such requirements were answered, and all papers relative to the security executed.

This application of Mr. Giddings for the loan seems not to have been acted upon or considered by the executive board *until the 4th day of September 1872*, which, singularly enough, in point of time, happened on the *same day* as that *upon which the applicant died.*

On this day the board declined the loan for $6,000, upon the value of the land offered as security, but made a *counter proposition* to advance on it a *sum of $5,000* on the same terms. This proposition was *never accepted or de-*

clined by Mr. Giddings, as his death had already taken place *the day before the proposition was communicated* through the agents of the company in Chicago, to the address of Mr. Giddings at Monmouth.

THE "STATU QUO" OF THE NEGOTIATIONS AT THE DEATH OF GIDDINGS.

It seems to us well that we should stop here, that this court may observe the *precise condition* in which the death of Mr. G. left these negotiations.

It is at this point that the appellants, as administrators, assumed the charge of Mr. Giddings' estate. The above statement of facts may be verified by the *record*, which shows that :

First. On the application for a policy of life insurance, the *actual amount of that premium* ($302.52), *had never been named* or *stipulated upon* with Giddings or any agent; but the company computed it, for the first time, at $302.52 in the policy made out, and sent this policy to the agents at Chicago.

Second. The defendant, acting on the representations made as to the health of Giddings in his application, did, on the 24th of August, 1872, have a policy filled up and sent to their agency at Chicago *to be delivered* by them to Giddings *upon payment* of the premium fixed, and not otherwise. *The premium was never paid or tendered* during the life of Giddings; therefore, the policy was never delivered to him, nor did it ever *take effect!* The contract lacked—to make it binding—the concurrent act *of payment* by Giddings, without which it could not take effect, and his *assent* to the rate of premium.

Third. Pending the application of Giddings, and before any action thereon, the applicant was stricken down on the 15th of August by the disease of which he died on

the 4th of September. (See proofs, Record, p. 99.) The company, in total ignorance of *this change*, was deceived, and had the policy even been delivered, it could have been rescinded by the insurers, on the ground of fraud or mistake.

Fourth. The contract of a loan was never entered into or concluded. The application was for a sum of $6,000. But the company declined this, and offered, upon the same land, only to loan $5,000, to which last proposal there never was any assent by deceased. And the appellants now *do not offer* to consummate the securities offered, in case the loan were to be made.

The Allegations of the Bill.

What, then, is the claim made by the counsel for appellants? It seems that there is an *antagonism* between their bill as filed, and some parts of their argument.

The bill (page 17, R.) alleges "that there *was an ar-* "*rangement between said Giddings* and the agents of the "*company*, that in case said several applications for *life* "*insurance* and for said *loan* should be accepted by the "company, that the *premium* to be paid for the policy "should be deducted from the money loaned, and the "balance paid to said Silas Giddings."

"It charges that the company accepted both the applica- "tions at the home office in Milwaukee, and that said Gid- "dings was ready and willing to fulfill and carry out and "consummate, in all respects, the contracts aforesaid "entered into between him and said company; that he was "ready, able and willing, *and his administrators, since his* "*death, have stood ready, able and willing*, and offered and "tendered full performance on their part, by tender and "offer of the *premium* and *neeessary securities required* "*upon said loan to fulfill each of said contracts on their* "*part.*"

The prayer of the bill is for a *specific* delivery of the policy and its payment of $6,000; but, for obvious reasons, a decree is not asked for a specific performance of the loan contract. (Page 17, R.)

The testimony in support of the above allegations is (at pages 35–68 of Record), "that Mr. Giddings said he "wanted a loan of $6,000, and would not take *anything* "*less*, and if he could *not get that, he would not take the* "*life policy*. His application, he said, was based on the "$6,000 loan, and *if he could not get the loan, he would not* "*take the insurance*."

Since the counsel in the argument below assumed that the *two* applications and the *two* contracts were entirely *independent* of each other, and a *specific performance of the loan contract* is not prayed or sought for, what is the possible reason for connecting the two things in the bill of complaint? We are at some loss to determine whether we should be treating this court fairly by argument to show the utter groundlessness of the claim, that any conclusion or agreement at law had ever been arrived at between the parties as to the loan, or that such an agreement, if made, could have been consummated after his death by appellants.

On the part of the defendant, we affirm the position assumed by counsel of appellants in a written argument filed below, "that there was nothing in the policy "issued, or in the application, or in any correspondence, "indicatiug that the policy was dependent upon the loan." But the contrary: "The two things stand entirely dis- "tinct from each other! And the agent at Milwaukee "swears, 'that the two departments were entirely dis- "tinct from, and independent of, each other'—and hence "no agent of the company had any right or authority to "attach such condition as is claimed to the transaction—

" or to qualify especially by parol the legal effect of the ap-
" plication, and the conditions of the policy issued."

If, notwithstanding the case made by the bill, the above citation from an argument of one of the counsel still defines *their real position*, there need be no controversy as to the loan contract; but we are at some loss how to understand this, in connection with the pretence or allegation of the bill that an "*arrangement was made*" that in case said *applications were granted*, the *premiums* of *the policy should be paid from the loan, coupled with* the most explicit and oft-repeated allegation, that both applications for the loan and insurance were actually *granted?* From this would follow the deductions of another argument they make, that the policy did not lapse because of *non-payment of the premium*, but because the company failed to pay over the loan money it had agreed to make, and from which the arrangement was, that the *premium* should be *deducted!*

To refute this last allegation, it is only necessary to remind the Court that the application for the loan was never granted; but, as we have already stated, it was refused. When, however, it was proposed to make the sum $5,0000 — on the same land — the death of Giddings had prevented further negotiation; and here it rested, and rests forever.

And now let us assume (*arguendo*) that the application had been accepted — who, upon his death, can become legally authorized to execute the condition of the loan? Who execute the mortgage, procure abstracts of title, remove incumbrances, &c.? Suppose the death of Giddings left a valid preliminary contract, with terms to be carried out, as we have shown, could this Court decree any performance that would meet the emergency of the case?

The laws of Illinois, in which Giddings resided at his

decease, have established the rules that govern the administration of his estate. The appellants are only his administrators under these laws, and they are only in charge of the *personal estate*. Those laws give them no control over the real property. No power is given them to sell or mortgage the real estate. This goes to the widow and heirs; and in case of any deficiency of personal estate to pay debts, the courts order sales, under their direction, of so much as may be necessary to liquidate any balance. Now there is nothing in all this record to warrant the conclusion that *Giddings himself* would have *undertaken* to *carry out this pretended agreement* and *receive* $5,000, instead of the $6,000, for which he had asked. On the contrary, his own declarations of a recent date raise a presumption that he would not. And the attempt here made, by appellants, seems like an effort on their part to establish by a decree of this court a "*quasi*" *testamentary disposition of property*, which he had failed to make in view of his death. Had he desired to incumber his estate, by mortgage, after his demise, he could have so provided by will. He had at least 20 days to do so, during his last sickness, and he never made any sign, nor gave any such power to the appellants as administrators, or to any other person as executor. And he is shown to have retained, during all that time, a *disposing mind* and memory.

One word more: Could this Court decree, that in case this loan had been in fact agreed upon, and the money was to be paid in case the mortgage were given, that these appellants might, as they allege they offered to do, make such a mortgage as required, and consummate the loan?

Clearly it could not. It could not in the exercise of its jurisdiction interfere with the *local* administration of the Giddings estate, under the laws of Illinois and the local courts of her jurisdiction. In that case it would be compelled to

see to the condition of the estate, ascertain whether solvent or insolvent; its liabilities and assets; and see that no injustice should be done to minors, heirs, widow, or creditors. This whole matter should be investigated. Would this court decree a *mortgage incumbrance* to be placed on the same specific parcel of land, and clear off incumbrances (if any), so that $5,000 might be obtained from this company and placed as personal assets, under charge of, and to the credit of the appellants in this case?

If this cannot be done, it is obvious the charge as to this loan should be abandoned; and then the case rests upon the matter of the insurance.

FAILURE OF LOAN AN ABANDONMENT OF INSURANCE.

The *failure* of the loan was the *contingency* upon which Mr. Giddings *had said* he *would not take the insurance!* The allegations of the bill, followed by the proof of Mr. Giddings' intention, establish his *intent* to do so. It was out of the proceeds of the *loan* that it was said, "the *premium was to be deducted.*" And it was said it made no difference to the company what the *arrangement* was, if it got the money. But it never *did* get the money. It was only after his death, that even appellants tendered the premium. The company had long before ascertained that when the policy was made out, deceased had fallen sick, and was in fact dying. His condition had totally changed, and the application, which it is said was accepted, was no longer true, and its statements were in fact false.

But it may be argued, as before, that there was a "delivery of the policy, because it had been sent to Chicago."

Now it is conceded that the action of the company upon the application for insurance had no connection in fact with the application for a loan! The business of vesting the surplus accumulation of this company (some $18,000,-

000,) upon mortgage and other security, is specially confided to a separate department. We need not say how great the responsibility and care required in such a department by the trustees of this institution. The peculiar knowledge they must seek, and the vigilance they exercise in their charge, may account for the rank to which, in the northwest, this great corporation has within a few years so successfully risen. It cannot afford to leave open questions of law, by any doubtful connection between itself and those dealing with it for insurance upon life, as covenants dependent or independent, between loans and risks; *all must be clear, all must be understood.* And hence the pains taken to have its contracts, charters, applications, and instructions printed, so that all who run may read.

The insurance deparment in this case departed from no precedent or instruction, nor made any special bargain that the policy filled up should be delayed for, or dependent upon, any loan. The officers, as in duty bound, made out a policy upon a printed blank, based upon the applicant's printed application. And they properly sent it, according to the usual course of business, to their agents in Chicago. Here, according to its terms, if Mr. Giddings had willed to perform the condition, upon which alone it could be delivered, he *might* have *done* so, paid the premium, and taken out the policy, but he failed to do so.

Now to all intents and purposes the sending this policy to the agents of the company at Chicago, was no more an act of *delivery, or waiver of any condition*, than would have been the change of the same instrument from one desk to another, or its change of custody from one agent to another at the home office in Milwaukee, in which it was filled up. Fortunately no agent violated the conditions of his trust, and *no delivery was made* against the terms of the contract.

The counsel below say: "Had the policy been de-

" livered, and the premium paid, that contract would have " been an *executed contract*, and taken the place of the " *executory* contract, &c."

Very true, indeed, but the *premium was not paid*, and the policy *was not delivered*. Neither, as the agents swear, was there any understanding that it should be, unless the insured came forward to perform the precedent condition, upon which only any contract made with this company for life insurance could ever take effect.

It only remains for us, before taking up the *legal argument*, to again anticipate the argument which is suggested by the bill. That there was some *waiver* or *postponement* of the day of payment of the premium, because of the loan, and that the result in one case had any dependence upon the other.

If that were so, and the loan failed, how can this court, in the exercise of the special jurisdiction it can exercise in these cases of the specific performance of legal contracts, decree that any contract existed between the parties in either case, of the application for the loan, or insurance, which the court can, in the case at bar, be called upon to execute?

The uniform rule of equity in all cases of a like application, is that the contract itself must appear to be "*con-* " *cluded, certain, and specific in all its parts, and that where* " *it rests to any extent on treaty, or where it is uncertain or* " *undefined in any particular, it cannot be enforced.*"

And Mr. Story, in his text, 1 Story Equity Jurisp., Secs. 793, 736, makes this very apt illustration: "Where the " contract is constituted by proposal upon one side, and " an acceptance on the other, the court will never decree " specific performance, unless the acceptance is uncondi- " tional and unqualified." (Sec. 793.)

And again, courts never decree specific performance of

executory agreements, where they cannot *superintend* the performance of the contract on both sides. (1 Story Eq., Sec. 793.)

It would be easy to read a volume of cases, to be cited from books as respects the care exercised by courts in this class of cases. But we must pass on to other points decisive of the case!

Points for Defense.

We make the following points in support of the decree:

(1). The application of the deceased, Mr. Giddings, for insurance, was based upon his physical condition at the time it was accepted, that being the *subject matter* of the contract. The *change in his condition* on the 18th day of August, 1872, without *the knowledge of the company*, avoided the effect of the acceptance, made by them without such knowledge, on the *24th of August*, subsequently.

(2). But it was a well understood *condition* of every such contract, which deceased *well knew*, that before a *policy* could become effective by delivery, the premium must be first paid. The delivery in this case was *never made*, the premium was *never paid*, and the policy *never took effect.*

(3). Upon the theory of appellants' case, assuming that there was such a connection between the two applications for a loan and life insurance, as *made one contingent* or *dependent* contract of both applications, and that the money for premium was to be deducted from the money received on the loan, there is no reasonable pretext for the claim that any loan was effected, and so the theory of dependence utterly fails.

(4). The power of the court to decree a specific performance of contract is limited to cases in which the con-

tracts are clear, and their performance is practicable, reasonable, and possible.

(5). The deceased applicant had never assented to, or knew of the amount of premium fixed!

There was no contract ever concluded; the terms were still open to negotiation; the subsequent death of Giddings has rendered any performance impracticable, and the attempt of this court to now carry the intention of deceased into effect, would be attended by insuperable difficulties, which places the attempt itself outside of any reasonable discretion of this court.

I.

The Legal Argument.

The first *question of law* to be considered, in point of importance as well as time, is the effect produced by the change in *applicant's health* upon the whole transaction, between the date of his application for insurance and the day upon which the policy of insurance appears dated? Upon this fact appearing in the court below, that during the *pendency of this application*, and before the acceptance by the company on the *24th day of August*, the applicant was *stricken down* on the *15th of that month*, by disease of which *he died on the 4th of September following*. The very able Judge of that court (Blodgett), before whom the case was heard and decided, says that this sole objection was "enough to *dispose of the case*."

The language he uses in dismissing the bill will bear transcription. His clearness of statement, and his application of principles, make the opinion an argument of so much force that this court will need from us no explanation if we here transcribe a portion of it.

The Judge says: "It seems to me that the objection "last stated is enough to dispose of the case. If the same

" condition of health had continued on the 24th of August " as existed on the 30th of July, when the application was " made, or even if the defendant had been informed of the " change, and had acted with the knowledge of the fact " that the applicant was then sick, I am not prepared to " say but the contract would have been complete in equity. " But what the defendant did was in ignorance of a subse- " quent material fact, and therefore the complainant should " take nothing by this action.

" I think, too, it may well be doubted whether the mere " act of filling up the policy by the officers of the company " and forwarding it to the agents is to be deemed an ab- " solute acceptation of the risk. The policy is still in- " choate, and remains in the control of the company " through its agents, as much as if it had remained in the " desk of the secretary at Milwaukee, and the acceptance " at most is conditional if the condition of the risks re- " mains unchanged.

" Suppose, for illustration, the company had sustained " such losses between the time of the application for the " policy, on the 30th of July, and the offer to deliver the " policy, as to impair its credit and financial standing, I " take it no one would doubt the right of Mr. Giddings to " refuse to accept the policy and pay the premium by " reason of the changed state of facts. So that although " the company may be said perhaps to have accepted his " policy on the 24th of August—his application, yet that " acceptance must be considered as based upon the under- " standing and condition that the condition of health was " the same as that reported in the examination on the 30th " of July. Otherwise then the minds of the parties can- " not be said to have met upon the proposition which was " then made.

" It was claimed upon argument that the application is " a proposition for insurance, and that when the company

" accepts or acts upon the application and agrees to issue " the policy, the minds of the different parties meet upon " the proposal. Can they be said to meet upon a proposi- " tion or ony other basis than that upon which it is made? " That is, that the state of things—the health continues " which existed at the time the proposition was made. It " seems to me very plain that the whole transaction must " be referred back to the condition of things in *statu quo*, " so to speak, that existed when the proposition was " made."

General Cases Decided.

The case of *Piedmont Life Ins. Co.* v. *Ewing*, 2 Otto, 380, decided in this court at the October term, 1875, was of a similar nature, and presented somewhat analogous questions.

The facts in this case are briefly stated by Mr. Justice Miller, in his opinion of the court, from which we transcribe them.

" It appears that Howes was publisher of a newspaper, " and that the special agent of the company (Huff) de- " siring to advertise in the paper, an agreement was made " that Howes should take a policy on his life for $5,000, " and the cost of a year's advertisement should go towards " paying the first annual premium. The advertisement " was to cost $70, and its publication in the paper com- " menced at once. This was about the 28th of August, " 1871. Howes made his formal application, and the " company sent its policy to the local agent, Bell, with in- " structions to deliver the policy, on the payment of the " balance of the first annual premium, to wit, $17.70, the " whole premium being $87.70."

After the court recites from the record, several other ineffectual attempts to obtain this balance, Justice Miller continues to the effect that Howes died on the 14th of

October, and Howes' friend Rogan, on the same day, paid to a man using the same office, occupied by Bell & Co., the agent, the balance of the premium, $17.70, and took a receipt in full for the whole premium from R. A. Hufford, agent for Bell.

Neither of these agents knew of Howes' condition, as to health, at the time Hufford wrote to Bell requesting him to send a policy by mail, *which he did.*

Upon this state of facts, in a case where the *policy itself had been issued*, this court held that there was *no contract* which could be enforced against the company, even upon the policy of insurance which *had been issued.*

Because, as this court says: "It will perhaps be admitted that if there had been no agreement before Howes "was at the point of death, between himself and the insurance company, as to the *terms of the contract;* Howes "alone could not at *that moment*, by any act of his, perfect "the agreement. It cannot for a moment be contended "that while the parties are still in negotiation as to the "terms of a contract, one of them learning of a total "change in the condition of the *subject-matter of the contract*, of which the other *is ignorant*, can at that moment accept terms which he has refused before, and by "doing so, bind the party who has offered those terms "when the condition of affairs was wholly different."

And the court goes on to discuss the details in that case, finding it impossible to conclude that up to the time when Howes was dangerously sick, and the $17.70 was paid, that there had been anything more than negotiations; there had been *no meeting of the minds* of the parties, on the *necessary terms of the contract*, as the amount and *mode of payment* was still under consideration.

And the court conclude their opinion in the eloquent language of the judge (Miller):

"To hold that when he was *in extremis*, an *hour or two* "*before he breathed* his last, a friend could pay this small "sum to an agent of the company, without the agent or "the company having any idea of the condition of the dy- "ing man, and thus secure an obligation to pay his admin- "istrator $5,000, is to *affirm that one party* to a *negotiation* "can delay his assent to the terms of the contract, until "the *changes of* fortune enable him to reap all the benefits, "and throw all the losses on the other side."

The judge, in this case, disposes also of many, if not all, the cases which counsel in the case cite for appellants, by a brief and distinctive analysis, as follows:

"This case differs very widely from those cited, in "which a *delay* in *payment has been treated by the court as* "*waived*. All such cases proceed on the ground that there "has been a *valid agreement* as to *terms*. In most of them "one *or two premiums have been paid*, and the *delay in* pay- "ing subsequently has been *waived or accounted for;* or, "*the amount* of the *first* payment having been *agreed on;* "the agent or some one for the company has *so acted with* "the assured in the matter as to show a *consent to delay*."

The sound reasoning of this opinion, without the qualifications last named is just as applicable to the case at bar, and would seem to be decisive.

We understand the reasoning to be: that even if Giddings, the applicant in the case at bar, had, before his death, through some friend or agent, *paid the premium*, and *obtained a delivery of his policy*, yet it would have been *void* as a valid contract, because the company accepting his terms, while they supposed he was in a *sound state of health*, that being the basis of his application, ignorant that a *change had taken place*, the contract was void, or voidable. In this view, it should be as it is, clear beyond controversy, that the minds of the parties never met, and

no contract was ever concluded on the basis of the change.

The application of Giddings represented *him* of a sound constitution, and in a sound state of health; whereas, in fact, owing to the *change* that had occurred in the subject at the time of the company's action, a risk upon the health of a man "*in extremis*" and dying of a disease which had stricken him, before they accepted his application.

On this point we cite also the case of *Schwarz* v. *Germania Life Ins. Co.*, 18 Minn., 448.

In this case, plaintiff made an application Sept. 1, 1870, to the agent of the Insurance Company at St. Paul, upon the life of her husband, Ferdolin Schwartz. The application was forwarded to New York, and by due course of mail a policy was returned to the agent. The policy was dated Sept. 5, 1870, and payment of the premium was required annually. The agent sent the policy to the assured, who declined to pay the premium. By an arrangement between the agent and assured, it was proposed that the terms of the *policy should be changed* so as to make payment of the premium *semi-annual*, instead of annual; and the company being advised of the arrangement, returned a policy of the same date as the previous one, containing the change. This was *received Oct. 25, 1870.* On, or about the 13th Oct., 1870, the assured was taken ill and died on the *29th of the same month.* This last policy was never delivered, although plaintiff had tendered the amount of the premium to the agent, and demanded the policy on or about the date of its receipt by him. Proofs of death were made, and in the court below plaintiff recovered.

The application for insurance in that case literally read the same as the application in this case, that is, the applicant declared "*that he had made true answers to the ques-*
"*tions, and that it was agreed that the statements should form*
"*the basis of the contract for the insurance, and also that*

" *any untrue and fraudulent answers, or any neglect to pay*
" *the premium on or before the day it became due, will ren-*
" *der the policy null and void, and forfeit all payments made*
" *thereon.*"

Held that plaintiff's application was a proposition, and payment of the premium was *a necessary condition to secure a delivery of the policy.*

It was competent, it is said, for the company to *accept* or *decline* an application, at *its own option,* and therefore it is at liberty to impose such terms and conditions as it *may see fit, upon an acceptance.* It was therefore competent to transmit the policy to the local agents, with instructions general or special, to deliver the same *upon payment of the first premium,* and provided the insured was *in good health* at the time of such delivery.

It is said also, that the transmission of the policy to the agent *should go no further than to signify* defendant's acceptance of plaintiff's proposition *on condition* that her husband was in *good health,* and *would pay the premium,* there being no action upon defendant's part, except the transmission of the policy *to its own agent, to be delivered upon payment of premium,* there could be no contract made, nor " any terms agreed upon save such as composed
" the conditions which became a part of the acceptance
" and delivery. The company acts through its agents,
" and the agents merely give effect to the conditions upon
" which this acceptance and delivery was agreed to be
" made."

II.

Passing from the nullity of the contract on account of this change which took place in the basis or fundamental conditions upon which the parties contemplated entering into a *contract of insurance,* we are brought face to face with the *conditions of the contract itself.* We have called

attention to these conditions. We have seen that the *act of incorporation*, the *by-laws*, the *printed forms* of the *contract and application*, all specifically require that the *payment* of the *rate* or premium is an *indispensable condition*, and a *part of the contract* in *all cases*; that no policy can be delivered or *take effect without payment of the premium*; that all agents are unauthorized and *specially instructed*; that this condition is not to be *waived* or *postponed* or discharged *by them*; that especially the charter of this institution, as a mutual insurance company, requires " that no person shall be insured so as to become " a member of the corporation or receive a policy the first " time he effects insurance, before he pays the rates " fixed upon as premium, and determined by the board of trustees.

In the case of *Eliza J. Mackey* v. *Mutual Benefit Life Insurance Co.*, 118 Mass., 178, it was held by the Supreme Court of Massachusetts, that the evidence having shown that the only form of contract contemplated by the parties was a policy to be issued upon application and payment of premium, and no delivery having been made on account of *non-payment*, it was held there was no contract of insurance.

And in that case the policy was in the hands of the agent *to be delivered!*

Special Attitude of Appellants.

Now it is contended that because the company accepted the application of Mr. Giddings, it dispensed with these conditions. The courts are called upon to make a contract for this corporation without the restrictions imposed by *the charter upon itself*. That because the policy was made out *to be delivered in case* the applicant himself should perform the stipulations to which he had assented by his own proposals in the printed form of the company. And it is

assumed as law that defendant was to hold the policy at the demand of Giddings or his representatives, and *deliver* it at any time, when called for; this also to be done *with* or *without payment of the premium.* It is solely because this was refused, and the position unrecognized after his death that a court of equity has been called upon *to enforce this demand now by a bill for specific performance.*

A further position was taken by counsel below that the company in this case was *bound* in law to make a tender or delivery of the policy to the insured, and if accepted, there would arise a *promise to pay the premium*, which the company could *bring suit to collect.* It is said there was a delivery of the policy when sent to the agents, and that they were *bound to notify Giddings by letter* of its arrival in Chicago. That the neglect to *do so* was equivalent to a *postponement* or *waiver* of the payment of premium, as the *condition precedent of a delivery* which attached to the contract.

This court, in the case of *Insurance Co.* v. *Young's Administrator*, 23 Wallace, 106, answers this extraordinary claim of the appellants in most express language.

The court will find Mr. Justice SWAYNE in that case leaves the counsel here nothing to say which can more effectually answer the counsel of appellants.

In that case, Mr. Young, at *San Francisco*, made an agreement with the agent of the insurer's company, located in *New York*, to insure his life. The agent acknowledged the receipt of $99.30, as the *first quarterly premium*, and the policy was to *take effect from the date of the application on the 5th of June, 1867.* But the policy sent did not in terms agree with the contract or memorandum of agreement made by Young with the agent. In two respects only was there a difference. (1.) The quarterly payment instead of being 99.30 as agreed upon, the policy

sent made it only $96.60, a difference in favor of insured. (2.) The policy sent was ante-dated, so as to run from 5th of April, instead of 5th of June, 1867, as agreed; this was against the insured. When the policy was received, Young was absent from home. It did not appear that he ever *received any notice of the policy having arrived back from New York.* On the 21st of August he was shot, and died on the 20th of September. The representatives brought suit against the company to recover on the policy.

In its opinion this court holds first that because the company had waived the terms made by deceased with the agent at San Francisco, there was only a qualified acceptance, and Mr. Young was not bound to accept the qualifications, and there being no evidence that he *did accept*, the company was not bound.

His Honor, JUSTICE SWAYNE, upon the question of whether there was any valid contract, says: "The appli-"cant assented to the proposition contained in the receipt "of the agent, but the company did not. The company "assented to the policy, but the applicant never did. The "*mutual assent*, the *meeting of the minds of both parties is* "*wanting*. Such assent is vital to the existence of a con-"tract; without that there is none, and can be none."

But we cite this case chiefly upon the question made by appellants; that there should have been notice communicated by the agent to insured upon his receipt of the policy, so that a delivery could take place upon their own terms.

JUSTICE SWAYNE says: "If it be said there was fault "on the part of the agent, for which the company is re-"sponsible, in not communicating promptly and fully with "the applicant upon the arrival of the policy, there are "several answers to the imputation. Such fault viewed "in any light cannot be taken as the legal equivalent of "the assent of the applicant to the terms of the policy.

"But no such fault is shown. The applicant *knew that* "*the company was not bound, and would not be bound un-* "*til it chose to become so, and that it had the right to do* "*what it did. It was his duty to keep up the necessary* "*communication with the agent by calling upon him when* "*the answer from the office in New York might have* "*been expected to arrive. And if he intended to be ab-* "*sent, by giving the agent his address during his absence,* "*and taking from him a promise to communicate the re-* "*sult as soon as the reply was received.*" (23 Wallace, 107.)

Payment of Premium made a Condition Precedent of Delivery.

The counsel of appellants seem strongly indifferent to the question the defense have made in the case from the beginning, that *no delivery* of the policy could have been made by the company, or its agents, without a very gross disregard of every principle, by which the corporation was governed. Mr. Giddings in his application was compelled to sign his own assent to the condition, that *payment of the premium* was essential to any contract the company could make with him before any *delivery* of a policy could be made. This condition was embodied in all the policies of this corporation. It was deemed an essential part of *instructions* issued to agents. It was in all the *printed forms.* The power of waiving or postponing payments was reserved to the *board of management* only. It must be apparent, therefore, that if the *condition precedent* in this case cannot be made available, it should be abandoned, because it can never protect itself by such stipulation. Surely nothing can be more *manifest* in this case, than that so far as the power and intention of the corporation could go, to make itself understood, and express its determination, that no contract should take effect without such condition every thing possible *had been done.*

Neither, as the court will observe, is this provision, in contracts of this kind an *innovation*. We have a great number of *decided cases* (*in the Reports*), which affirm the rule. Mr. Bliss says in his *elementary work*: ["Bliss on Life Insurance," p. 230], that in all companies of life insurance the policy provides, "that it is not to take *effect* "*until the first premium is paid*. In such cases if there "is no actual delivery of the policy under such circum- "stances, that a waiver of payment of premium may be "inferred, there must be some satisfactory proof that the "premium was so paid, or that its payment was in fact "waived." (Bliss Life Ins. Co., p. 230.)

In the case of *Collins* v. *Ins. Co.*, 7 Philadelphia R., 201, was a case where a policy was duly signed and sealed by defendants, and transmitted by them to Andrew Manship, then agent for the State of Delaware. The application had been made through Manship, the agent, but the *premium not having been paid*, and parties entitled to receive policy *declining to pay it*, there was a controversy as to whether, like the case at bar, there had not been a *delivery, inasmuch as the policy had been made out and sent to the insurer's agent.*

But the Court hold this language: "It might as well be "contended that a shop-keeper is bound by a receipted "bill, sent to the house of a customer who does not find "it convenient to pay, as that in this case should be con- "sidered as taking effect because it recited payment when "its delivery was made conditional upon payment. With- "out delivery, it is merely inchoate, and of no more real "value in the scales of proof than an unuttered thought, "or a design which is not executed."

Howell v. *The Knickerbocker Life Ins. Co.*, 44 N. Y. R., 277.

The policy contained the provision that the policy should continue in force until the decease of the person whose

life was insured, *provided* that the assured should *pay or cause to be paid, annually, on or before* a specified *day* in each year, a certain premium payment, and it was held a *condition precedent.* Uuless performed, the policy was declared to be no longer of force, although in that case, performance *was prevented by act of God.* And this, though in that case the person insured was *willing and ready to pay* on the *day named, being only prevented* by a *stroke of apoplexy* during the day, and of which he died.

Also to same, see *Ruse* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y. R., 516.

In the *St. Louis Mutual Life Ins. Co.* v. *Kenedy*, 6 Bush., 450, it was decided that even the giving a note was not equivalent to or a waiver of a *cash payment* in *such cases.*

We find, in Bliss on Life Insurance, citatitions of a number of cases to the same effect. The provisions as regards payment of premiums are always included, and they are treated as regards time and effect necessary and essential. The payment of premium in all life insurance contracts is as a rule a necessary and condition precedent essential.

Mr. Bliss cites:

Fauned v. *State Trust Life Ass'n*, 101 Mass., 279.

Hoyt v. *Mut. Ben. L. Ins. Co.*, 98 Mass., 539.

Markey v. *Mut. B. Life Ins. Co.*, 103 Mass., 78.

Herman v. *Phœnix Mut. L. Ins. Co.*, 17 Minnesota, 153.

Marland v. *Royal Ins. Co.*, 71 Penn., 393.

Whitley v. *Piedmont & Arlington Life Ins. Co.*, 71 N. C., 480.

Bradley v. *Potomac Fire Ins. Co.*, 32 Md., 108.

Sullivan v. *Cotton States Life Ins. Co.*, 43 Ga., 423.

Williams v. *Washington L. Ins. Co.*, 31 Iowa, 541.

Watrous v. *Mississippi Valley Ins. Co.*, 35 Iowa, 582.

Rogers v. *Charter Oak Life Ins. Co.*, 41 Conn., 97.

Peoria M. & F. Ins. Co. v. *Walset*, 22 Ind., 73.

III.

Cases cited by Appellants.

The decisions cited by the counsel of appellant are authoritative and well reasoned cases where they can be applied; but, in this case, they are not *applicable* or *in point.*

With one or two exceptions, all are cases of *fire insurance.* The case of *Fried* v. *Royal Insurance Company*, is a life insurance case cited from 47 Barb., 128; has no application, because in that case there was no question of the terms agreed upon, or the contract. The policy went into effect, though *it had never been delivered*, and was in *operation one year*, when the plaintiff tendered the premium for another year, which the agent refused and before the end of that year *Fried died.*

The Supreme Court of New York say: "The com-
" pany admit the acceptance of the proposition, payment
" of the premium and issuing of the policy in accordance
" *with the contract.* It was no part of the contract that
" its *binding effect or validity* should *depend upon any sub-*
" *sequent act* of themselves or of their agent in the actual
" delivery of a policy so issued to plaintiff. The accept-

" ance of the proposition and the premium, the making " out and authenticating a policy and the transmission of " it to their agent, was all the *legal delivery required.* " These acts amounted to the consummation of the con- " tract; the minds of the parties had met, and action had " been taken upon it by defendants. Their *retaining the* " *premium* estops them from denying that the contract " was perfect."

The court also rebukes in terms the conduct of the company that can come into court and set up its own breach of duty and good faith as a defense to an action.

In the absence of such cases as we have already cited in this brief, we would be at a loss for a more relevant application of the principles we seek to enforce than can be made in this case. It is precisely the doctrine needed in this case to support the position of the Milwaukee Company " that *the binding effect* or *validity* of a *policy* may " depend upon subsequent acts in the actual delivery of a " policy issued to plaintiff."

On the other hand the case shows, that even *without a policy* the agreement of insurance may be consummated, and perfect by the *payment of* premium, and the mutual performance of things agreed upon under the contract, of which the policy is generally the highest evidence to be furnished of the contract made.

The counsel of appellants cited below two cases decided in this Court:

Commercial Mutual Marine Ins. Co. v. *Union Mutual Ins. Co.*, 19 How., 318.
Insurance Co. v. *Colt*, 20 Wallace, 560.

Both cases arose out of fire insurance controversies.

Aside from the general principles that govern in the making of all contracts and the interpretations of the courts, there is nothing specially applicable, nor is there anything to controvert. The defense in this case may ex-

press their entire assent to everything said in those cases, as indeed the facts appear in them; it would be difficult to understand how the Supreme Court of the United States could have come to any other or different conclusion. We are of entire accord with our honorable and learned friends on the other side; but a DIGEST of such cases could not *change the facts* of this case. Sound upon authority, as well as reason, they are of no application here.

In the *first case*, the court seem to have met one view of the prosecution in this case, which pleases the counsel of applicants. It was the usage and custom of the company in the case cited to receive *premium notes*—not cash—and the court says, "that the *promise to give such a note* was a "*sufficient consideration for the promise to make a policy.* "It is admitted that the usage is to deliver the notes when "the policy is handed to the assured. If the defendants "had tendered the policy, we have no doubt an action for "not delivering the premium note would have at once "lain against the plaintiffs; and we think there was a "mutual right on their part, after a tender of the note, to "maintain an action for non-delivery of the policy."

The citation of this case is made to show perhaps, that if the North Western Mutual Life Ins. Co. had delivered its policy in this case to Giddings, contrary to the fundamental provisions of its organization, and stultified itself, it might have indeed *maintained an action* for *non-payment of premium.*

This, however, is not the question we have been trying on the part of the defense. We never made any such agreement, and we never released any right. The essential condition remained, and Mr. Giddings understood was attached to every contract of the company he was dealing with. That condition was never waived by any delivery of the policy, contrary to its own stipulations. We are not hampered by any usage or custom, nor is there

any custom or usage that hindered defendant, or any law that forbade it in this case from making *their own contract*. It is the contract as *made* between the parties in *this case*, that we humbly submit the court is bound to consider and decide. While in doing so, it will carefully avoid making one that was never contemplated by the immediate parties to the transaction.

We cite also the case of *Taylor* v. *Fire Insurance Co.*, 9 How., 403, which will be noted perhaps by appellant.

Where this Court say, in reply to the objection in that case by the Insurance Co., that the premium *was not paid.*

" But the answer to the objection was, that the premium " in judgment of law was *actually paid* at *the time*. The " contract *became complete*. The *mode of payment* had not " been *prescribed by the Company*, and the agent was at " liberty to prescribe the *mode* of *payment*, and did so. " The *payment was by check payable to his order, and it was* " *admitted that the insured had funds in the bank*, upon " which it *was drawn, sufficient to meet it*, and *it would* " *have been* paid *on presentation*." In fact it *was payment*.

And it will also be seen in this case, that the offer came from the Insurance Company to insure the property on certain terms, which the insured had *accepted.*

The mode of payment of premiums had not been prescribed to the agent, and he *could accept*, as *he did do*, *the check* of *the insured*, drawn against funds *in bank*. The contract was completed, leaving nothing open between the parties to make it binding and executed.

9 How., U. S., 390.

IV.

We again make a last point—that the defendant in this case has never been *in default* in any single particular, nor did *it fail in any thing*, which *it was ever requested to do*, during Giddings' life time; and there is no *pretense* or *allegation in appellants' bill*, of *any such default* or *omission*; no default is charged, and in this respect the bill itself *is defective for want of equity*.

This bill does not pretend that any *tender was ever made, of the condition to pay premium money, during Mr. Giddings' life*; the bill contains no allegation of a *tender or performance* as to the *contract* of *loan*; as respects the *security*, that should have been forthcoming. In the ordinary allegations of such a bill, as this is doing *equity*; by the party *seeking* relief it is a necessary allegation, and there are no allegations, that the deceased Mr. Giddings did what he was bound to do, or that he ever *performed* or *offered to perform* on his part, the pretended *contract* or *contracts*.

The appellants in these respects, put themselves forward upon the record, as seeming *volunteers*, assuming, that what Mr. Giddings *might have done*, they personally can *now offer to do*, as his representatives; and that the court are bound by their offers, in lieu of Mr. Giddings' own performances.

We submit to this court that there is no precedent, in pleading for such equity, and, while the legal *power* is wanting, the moral right of the gentlemen is questionable; even should your Honors recognize in the promises of appellants any value of any kind whatever, in this vicarious *post mortem* mode of *performanee*. Still we say there does not seem to be precedent, reason or authority in favor of equitable rights so based.

We refer as for the general rule in these cases, to
1 Story Eq. Jurisp., Sec. 736.

He says, that in cases of covenants, and other contracts where a specific performance is sought, "it is often *mate-* "*rial to consider*;" how far the "reciprocal *obligations of* "*the party seeking the relief*, have been *fairly and fully* "*performed*."

"'*For*, if *the latter have been disregarded*; or *they are in-* "*capable* of *being snbstantially performed, on the part of* "*the party seeking relief*;' or *from their nature they have* "*ceased to have any just application*, by subsequent events, "courts of equity will not interfere," (citing,) *Stewart* v. *Raymond Railroad Co.*, 7 S. and M., 568, besides the illustration of Mr. Story in the text.

We have called attention to the difficulty of a substantial performance of the loan contract; owing to the death of Mr. Giddings, before he could perform on his part; and the utter impossibility of the present appellants doing any thing, which this court has authority to control, accept or ratify.

If it is a question of power, and the appellants are to be decreed to perform what is required to secure the loan; how is this court to learn what the courts of Illinois may be required to do, as respects the administration of the Giddings property? The bill does not lay any foundation for the investigation needed. It does not make the necessary allegations. Is the estate *solvent* or *insolvent* If *solvent*, the real estate goes into the hands of the heirs, but if *insolvent*, the same real estate must be sold to pay the debts of the intestate; can the decree of this court be interposed against the regular operation of the laws of the State? Will it interpose, by a decree bringing it in conflict, with local jurisdictions of the courts, and the interest of third persons and parties? Will this court go into the

State itself to enforce its decree, if it should turn out that a mortgage security, such as proposed, would be a disastrous measure of expediency, as to all other interests involved or combined?

We do not believe this. And we submit that not only is the bill defective for want of equity, but that it seeks in this court, what is *legally impracticable*; not within the jurisdiction of the court to grant, and beyond its legal and equitable discretion to consider. It would seem indeed, as if appellants had misconceived the nature of their case, and sought in this forum for the exercise of a power over human dealings, which no earthly tribunal can exercise.

THOMAS HOYNE,
Of Counsel for Appellee.

HOYNE, HORTON & HOYNE,
Sol'rs for Defendant below.

IN THE

SUPREME COURT OF THE UNITED STATES.

LOREN GIDDINGS, and LEANDER GIDDINGS,
Administrators of SILAS GIDDINGS,
Deceased,

v.

THE NORTH WESTERN MUTUAL LIFE
INSURANCE COMPANY.

SUPPLEMENTAL BRIEF AND ARGUMENT

For Appellees in Reply to Appellants.

We had prepared a full statement of facts and an argument in this case before receiving a copy of the brief of appellants.

We had not supposed it would be necessary to prepare any other. We had rested under, perhaps the *illusion*, it may be, that the main and leading facts in this case, were so clearly and incontrovertibly defined or established that nothing would be left for this court to investigate but the principles involved in making the final decision.

Under such an impression, we had taken special pains to make a candid, full and impartial statement of all the facts, avoiding any expression that anticipated the legal argument as to whether a valid contract had been made, or any opinion as to the legal relations which those facts might be found to establish in the opinion of this Court.

Upon reviewing that statement since we have been in possession of the appellants' brief, we see no reason now to make a single correction. But in view of the manifest contrast that exists between this statement of our own and that of appellants, we respectfully invoke the special attentian of this court to the difference between the two statements in connection with the printed record of the case.

We have been surprised at finding in appellants' brief what claims to be a statement of facts so utterly at variance, not only with the record, but our own apprehension of the entire case. It puts forward the unsupported statements of the witness Roberts, as to certain facts about which he was utterly discredited and contradicted. Instead of stating the circumstances in detail, upon which it was assumed that a certain contract in law had been made; the statement is boldly put forward in the facts of the brief that a *valid contract of insurance was made*, and that appellees failed in their duty by the *non-delivery* of the policy. We had hoped that the labors of this court might be abridged in this case by taking the main facts as established, while counsel might argue for the application of the law and construction of the contract. But unfortunately, the statement of appellants makes it our duty as counsel to specially traverse the facts as they state them, so that the court here may not be misled as to the actual case which is before them for a reversal or affirmance of judgment below.

We will therefore, as briefly as may be, review a few of the statements of fact to which we take exception.

1. At page 2 of brief, it is stated " that on or about the " 30th day of August (July), 1872, Silas Giddings made " application to the defendant company through the *com-* " *pany's local agents in Warren County, Messrs. Roberts* " *and Hubbard*, and their general agents for the State of

" Illinois, Dean and Payne, at Chicago, for a policy upon " his life for the sum of $6,000."

The only part of this statement true in substance or fact is, that Peyton Roberts, about the 6th day of August, 1872, (as he himself testifies, whose evidence is set out on page 6 of brief), presented two blank applications filled up in the name and behalf of *Silas Giddings, at the general agents' office, Dean & Payne*, at Chicago; one application for a loan of $6,000, and a second for a policy of life insurance of $6,000.

Roberts or Hubbard were not then, nor ever had been prior to that time, the local agents of the company. They had written to Chicago—to Dean & Payne—for blank applications to be filled up for Mr. Giddings, and which, after they were filled up, Mr. Roberts delivered, in person, at Dean & Payne's office, who forwarded both applications to the home office at Milwaukee.

That is the testimony. (See the brief of appellants giving testimony of Roberts, page 6. See Record, Ev. of Dean, *pages 48, 49, ibid* Mr. Payne, Ev. Record, 34, 35, 36; also Mr. Truman H. Day, p. 68.) The testimony of these witnesses not only shows that the agency of Roberts did not commence until about the 1st of September—long after the applications of Giddings were made—but also contradicts him as to the statement made, that Giddings ever said or that he (Roberts) had stated at any time that Giddings would take less than $6,000 upon his application for a loan.

If the court will now look at pages of the Record, over Oscar Payne's testimony (pp. 34, 35, 36), Mr. Roberts is asked by Mr. Payne, at the time the applications are presented (the loan and insurance each for $6,000), whether or not Mr. Giddings wanted or would accept insurance unless a loan was made, they will find an entire contradiction of the witness.

We here give from the Record the material part of the interview:

" Q. Did you see Mr. Roberts in your office in Chi-
" cago any time in the month of August, 1872?

" A. Yes, sir.

" Q. What time in the month?

" A. It was along the fore part of the month.

" Q. Have any conversation with him in regard to ap-
" plications for insurance?

" A. Yes, sir.

" Q. Who else was present, if any one?

" A. Our cashier was there, Mr. Day. I don't recol-
" lect of any one else being in the office at the time. We
" had a boy there. He might have been there and might
" not; I cannot say.

" Q. State whether or not, at that time, Mr. Roberts
" gave to you any application for insurance or loan from
" this defendant company for Silas Giddings, Senior?

" A. He had an application for a loan and for the life
" insurance at the time he was in the office at that time.

" Q. What did he do with them?

" A. He left them there with us.

" Q. What was the amount of insurance applied for?

" A. I think it was $6,000.

" Q. What was the amount of loan applied for?

" A. $6,000.

" Q. What, if anything, did Mr. Roberts say at that
" time as to whether or not Mr. Giddings wanted or would
" accept insurance, unless a loan was made?"

(Counsel for the plaintiffs objected to the question as leading and incompetent.)

"A. He said that Mr. Giddings wanted a $6,000 loan, and
" I looked the application over and expressed my doubts
" about the company granting so much money on the
" security, and he said, there is no use to talk, he could not

"get along with anything less, and must have that, or else "he would not take it, and he went on to press the claim. "He said that the security was good, and that the quality "of the land was good; the company ought to grant that "amount of loan on the land.

"Q. What, if anything, was stated in that conversation "as to Mr. Giddings' accepting the policy of insurance if "his application was approved by the company, in case "the application for loan was not accepted by the com- "pany?

(Counsel for plaintiffs objected to the question as leading and incompetent.)

"A. He said the insurance was based wholly on the "loan, and that if he could not get the loan, he would not "take the insurance.

"Q. Was there ever more than one time when any "such conversation occurred between Mr. Roberts and "yourself, here at your office?

(Counsel for plaintiff objected to the question as leading and incompetent.)

"A. Yes, sir.

"Q. I refer now entirely to the time when he delivered "you the application. Was there more than one conver- "sation at that time, or on that day, or other days?

"A. Well, I talked with him several times during that "day, and I had conversation with him after that.

"Q. State whether or not Mr. Roberts was, at the time "of this conversation—at the time he delivered the appli- "cation to you—an agent of the company?

"A. He was not, to my knowledge.

"Q. Mr. Roberts, in his deposition, has stated as fol- "lows: 'I also told them' (referring to Dean & Payne), "'that I had said to Mr. Giddings that I thought $5,000 "would be all the company would care to loan on the "security, and that he said that the sum would be satis-

"factory to him in the event of the company's objecting to "loaning more.' State whether any conversation of that "kind ever occurred with you, or between yourself and "Mr. Roberts?

(Counsel for the plaintiffs objected to the question as leading and incompetent.)

"A. We talked over the matter of security, and I ex- "pressed a very great doubt about the company being wil- "ling to loan as much money on that security, and he "pressed the claim that it was ample security, and that Mr. "Giddings would not accept it unless he could get the "$6,000, and he would not take the life policy unless he "could get the loan of $6,000. It was wholly based on "that.

"Q. What is the extent of the authority or agency of "Dean & Payne, in regard to loans for this company?

"A. We have no contracts for loan agencies at all; "we are appointed as insurance agents.

"Q. I refer more especially to the question of whether "they were authorized to accept loans?

"A. No, sir; we were not.

"Q. Or to make them?

"A. We make loans on our agency here under the "direction of the company; we never accepted a loan.

"Q. What authority have you, if any, as to the ac- "cepting of insurance or of applications for insurance?

"A. No authority, only to take the applications and "send them forward to the company for approval.

"Q. Have you any further authority than that as to "loans?

"A. No, sir.

"Q. Or had you any further authority as to either of "these in 1872?

"A. No, sir."

We now refer to the testimony of Mr. Dean, (Rec., p.

49,) which shows that neither Mr. Roberts nor Hubbard, who is his partner, were appointed local agents until about the last of August or 1st of September. At that time the Giddings matter had been substantially disposed of.

Mr. Thurman H. Day, (Record, at p. 68), confirm the truth of the facts stated by Dean and Payne.

Again if the court will look at appellants' own bill of complaint, (page 17), the statement above given as coming from the deceased applicant through the principal witness Peyton Roberts, is made an *allegation of the complainant's case.* Here it is alleged, viz:

" That it was *then and there arranged by and between* " said Co., *through said agents and said Giddings*, that *in* "*case said several applications for life insurance and* "*for said loan should be accepted by the Co. that the pre-* "*mium to be paid for the policy should deducted from* " *the money loaned and the balance paid to said Silas Gid-* " *dings, &c.*"

And the court will again observe, that the two applications for a loan, and insurance were never considered as joint or dependent applications by the appellee. No point was ever made upon the connection by us, but appellants, beginning with this allegation in their bill of complaint, —the counsel in their argument have used it as one element of their case, to show that the non-payment of the premium was due to the action of the company upon the loan—and that the loan when refused for $6,000—and granted for $5,000, had the consent of Giddings to accept the $5,000, on the security, and that there was no change of the original application—and the counter proposal to loan only $5,000 did not require Giddings' ratification.

At page 7 of our original brief, we have already set out all the conditions upon which loans are made by this com-

pany, and that the application of Mr. Giddings was not acted upon, until the 4th day of September, 1872, which was the same day as that upon which he died. And the declarations of Mr. Giddings, as given in evidence by his agent, Roberts, make it certain that he never would have consented to the counter proposal reducing the sum he applied for to $5,000, and accepting this last in lieu of what he asked for. Hence his death put an end to all further negotiations, and the matter remained pending.

We have now reached the conclusion of law which is stated as a fact in the statement. This, if true, in our view of this case, would preclude all further argument on the part of the company. We are told in the *statement* (page 2 of brief), that prior to the death of Giddings "a "due and valid contract for the insurance of his life in the "sum of $6,000 was made by and between said Giddings "and said company, and that between the making of said "contract and the death of said Giddings he was ready "and willing at all times to carry out and consummate "said contract—that he died on the 4th of September, and "that prior to his death said company did not tender him "any policy of insurance, in conformity with said con-"tract."

If the court will now turn to the original brief we filed for appellee at pages 2, 3, and 4, the honorable the judges of this court will find the exact and precise steps taken as they approached *the ultimate end* which Giddings had in view, but which never reached *the conclusion now so boldly assumed by appellants' counsel.*

The counsel have assumed a prerogative of this court in thus deciding in advance of any hearing that there was a *valid contract made.* In the controversy, as pending, *this is the very question to be tried.* That was the question decided below, against which our opponents have appealed here, and we submit whether it would not have been

better to have stated the circumstances upon which the claim *that a contract* was made, is founded, and given the company the opportunity of being heard, against the assumptions of the counsel and appellants.

First. We protest, that as we have argued, the record in this case, *does not support* the assumption that *a contract was ever concluded* by any proof in the case. That if even the terms had been all agreed upon, there was always one condition or stipulation of those terms, which required the applicant to pay the *amount of premiums fixed*, before the contract could take effect; and that before this effect could be given to any contract, the policy must be countersigned by the persons receiving the money, and *delivered* to insured.

The court below held, in his opinion, which we have transcribed in our original brief (p. 18), that the mere act of filling up the policy by the officers of the company, and forwarding it to the agents, was not to be deemed an absolute acceptance of the risk. The policy was still *inchoate*, and remained in the control of the company as much as if it had remained in the desk of the secretary at Milwaukee.

And Judge BLODGETT very pertinently supposes that if the company itself had, between the date of the application and the offer to deliver Giddings a policy, suffered such losses as to have become financially crippled, *no* one would doubt *the right of Mr. Giddings to refuse to accept the policy* and *pay the premium* by reason of the changed state of facts; and so the company retained (he holds) the right, although accepting the application on the 24th of August, when Giddings' change of condition was *unknown*, to refuse a delivery, if the condition of deceased was not the same as that reported on the 30th day of July or 6th of August, when the application was made.

Second. We have urged in the former brief the fact that

every policy issued from this office, as well as that filled up in the case at bar, contained the express stipulation that it should not take effect or become binding on the company, *until* the premium was *first actually paid*, and the policy *countersigned* by some agent authorized to receive the premium.

Thirdly. We have shown that the Public Law of Wisconsin, of which the charter of this company is declared a part, provided (Sec. 4 of Act, at pages of Record 86, 87), that every "person effecting insurance with the "company thereby became a member of the corporation, "and entitled to *share in* its earnings, as well as participate "in its losses." And Sec. 7 of the same Act declares: "That the *first* time any person becomes a member of this "corporation by effecting insurance therein, 'he shall, "before he receives the policy, *pay* the rates that shall be "fixed upon and determined by the trustees, and no "premium so paid shall ever be withdrawn from said "company, except,'" &c., &c.

Fourth. Irrespective, therefore, of the other questions, there was the law of the contract, which would have governed the making of this contract, in the absence of any express intent of the parties, by becoming an incorporate part thereof.

Fifth. But this is not all. At pages of Record 105 and 106, the court will find that the company, on the back of all the blank applications issued, of which the one filled up in this case was a copy, and which Mr. Giddings *signed*, the following instructions, by way of notice to applicants and parties, were printed, so that agents, as well as others, were advised, that no authority was conferred upon them, over the contracts applied for, viz:

"Agents having the receipts, and them only, will receive "the premiums when due, or before, but agents are not

" authorized to waive forfeitures, to make, alter, or dis-
" charge contracts, and no receipt will be binding on the
" company, unless signed by one of its officers, and counter-
" signed by the agent.

" No agent has authority, in any case, to waive or post-
" pone payments of premium, and the assured is hereby
" notified, that the only evidence to him of the authority of
" any agent to receive any premiums on account of this
" policy, is a receipt in printed form, signed by the presi-
" dent or secretary of the company."

It was under the restrictions so named and so printed, that all parties were advised, previously to the application, that there could be no *contract of insurance concluded* or *take effect*, unless there was a first payment of the premium, and no *agent has authority*, by any act of his, to waive or postpone any such payments.

Sixth. If we now add, that the policy was never countersigned by any agent, the premium never paid, and the policy never delivered, where are the facts in this case that show *any contract* whatever, or conclusion of contract, was *ever reached between the parties?* As we have stated in a former brief, the company decided, that if its requirements were met by Mr. Giddings, he could have a policy on payment of the premium, but before that requirement was met, and before the company had even accepted his application, on the 24th of August, 1872, he was stricken down on the 15th day of August by the death, which followed on the 4th of September, following, a change of which the company had no knowledge whatever, until after the policy was made out and placed in the hands of the Chicago agents to be delivered upon the terms stipulated.

Non-Delivery of Policy.

Among other things insisted upon as matter of complaint against the agents at Chicago, is, that they were "*guilty of laches*" in not *sending forward the policy to Giddings* at Monmouth, and if *he did not pay*, bring *an action at law against him;* that they voluntarily detained it until he had died, and then sent it back to the company.

There is no evidence showing that Mr. Giddings *did not know*, and that he was *not even advised* of the receipt of the policy at Chicago, where it was to be delivered. The court has only to look at pages 53, 54, 55, 56, 57 and 58, at the long cross-examination of company's agents, by the counsel of appellant, in which communications are proven with Roberts and Giddings, to see that it is not *even suggested* or *asked whether* the deceased, or the agents at Monmouth did not know, or had not been advised and informed that the policy had arrived, was in Chicago, ready to be *delivered* on *payment of preminm.* It is not even *pretended* that any refusal to deliver the policy upon demand was ever made.

A complete answer to this whole statement is made in our original brief, (page 25), where we cite the case of Youngs' Administrator, 23 Wallace, 106, in which Justice Swayne, delivering the opinion of the court in explicit language, says: "That the applicant knew that the company "was not bound, and would not be bound until it chose "to become so, and it had the right to do what it did. It "was his (the appellant's duty) to keep up the necessary "communication with the agent by calling upon him "when the answer might have been expected to arrive. "*And he says such fault, viewed in any light, cannot be* "*taken as the legal equivalent of the assent of the applicant* "*to the terms of the* policy."

The truth is proved to be as shown on the Record, (p. 99), on the proofs furnished of his death; that Mr. Gid-

dings, pending his application, was taken sick on the 15th of August, nine days before the company, at Milwaukee, passed upon his application, ignorant of the fact, and may we not presume, from the silence and non-action maintained by Giddings, was due to the fact which his agents desired to conceal, until after the recovery or *death of Giddings?*

This court will not certainly presume against the company, that if the fact *were known*, they would have *been silent*. It was only after the policy was in the hands of the Chicago agents, on the 24th of August, and about the time of his death, that the fact transpired that Giddings had been sick from the 15th day of August previously, and was so sick when they passed upon the application, without any knowledge of that fact, which, in any case, would have justified a refusal.

The Cases Cited.

We now leave the statement of facts to find that the cases cited do not in any respect run parallel to the case we have been stating, nor the case as the record presents it.

The counsel of appellant have referred this court, in the brief filed, to a very great number of cases, but the difficulty we find, in the study we have made of them, is, they are not in most respects at all similar cases, in point of circumstance, applicable in law, or authority in principle.

Nearly all of them are cases decided where *valid and legal contracts* had been concluded, but the obligation of which the corporation sought to escape because of the contract being in parol, or the absence of authority in the agent to bind the corporation; but scarcely a case is cited where, as here, the negotiation *was still pending*, when one party died, and the consummation rested upon an

agreed sum of money to be paid, before any provision of the contract could take effect.

The first case of *Kohn* v. *The Ins. Co.*, a preliminary contract was made, but the policy was not delivered when they heard of the loss of the vessel, but Justice WASHINGTON found there was no unfairness nor *knowledge of the loss* when the contract was settled. But suppose one of the parties making that contract had had *knowledge of that loss* at the time the agreement was made, the same as Giddings of his sickness, are we to suppose that that case would have been decided the same as it now appears? There is some difference between the "horse-chestnut and a chest-"nut horse."

But the counsel again say, the precise question arose in this Court, in the case of *Ins. Co.* v. *Higginbotham*, 5 Otto, 380. We confess to our utter inability to see it, and will state the case.

In this case the policy had been issued for more than a year, the *first premium had been paid*, and the contract had been in operation *one year*, when the second premium became due, July 16, 1870. An application was made 3 months after the lapse to re-instate the policy, and a certificate of health was furnished by the physician of the company, the *premium due was paid*, and the agent delivered a receipt to the insured at Washington, while he sent the papers to New Jersey, so that a renewal receipt might be sent as evidence of the restoration of the contract from the company's office.

Nothing more is said or done except that a few days after, on the 14th of October, the renewal receipt reaches the agent at Washington, and is delivered. The insured dies a few months after. An action is brought upon the policy by the widow, and the company then, for the first time, sets up that there *was a "change or derangement of*

"*health*" in deceased between the first day of October, when the agent at Washington agreed to *re-instate deceased*, and the *14th of October*, when the *renewal certificate came to hand* from New Jersey.

Now the real question decided in this case was not that a *change of health* would not avoid a contract, if the *knowledge of that fact was concealed* by a party, or that a change had occurred during the *pendency of an application*, like the one in the case at bar, but whether the contract did not take effect at the time the agreement was really made, on the *1st of October*, instead of the *14th day of October*, when the *renewal certificate* or the certificate evidence that the agreement had been made was received and delivered.

We may now cite the language of Justice HUNT. He says: "If we assume it to be true as a general proposition "that the policy speaks from the date of its issue, and "that the obligation of the applicant to make a full dis- "closure continues down to the completion of the contract, "and that the occurrence of a material change before the "contract is consummated must be communicated to the "company, we do not advance in the case before us.

"The question recurs, when was this contract of Dr. "Day consummated? If on the *14th day of October*, when "the renewal receipt was delivered, as the oompany con- "tends, then the rule bars the plaintiff's right to recover. "If as the plaintiff contends, the contract, by the inten- "tion and understanding of the parties, relates to the *1st* "*of October*, when premium *was paid* by the appellant "and certificate *of health transmitted*."

And again he says, "that the facts although actually "completed on the *14th day of October*, the contract was "*intended* and *understood* by the parties to take effect by "relation as of the *1st day of October* instead of *the 14th*" day of the month.

It will be perfectly obvious, we submit, if your Honors please, that this case, because the learned Judge uses language in relation to the continuance of representations beyond the day or time when the contract took effect, is not an authority for the practice of fraud or concealment upon the company during the time an application is pending and before any contract whatever was concluded or made.

The appellants next cite the case of *Ins. Co.* v. *Colt*, 20 Wall., 560, and they say that nearly every question that arises in this case was considered in that case by this Court.

We are the more surprised at this statement than even any other yet made, because, we would be prepared to concede all that is concluded in this case of 20 Wallace, and still expect complete success, in the case at bar, upon the very different state of facts.

In the 20 Wallace, we have a contract completed *in parol* between agents *authorized to contract*, terms all *agreed upon*, and *credit given the same as paid for the premium until a certain date;* and that the agents were to make out the policy and *keep it in their own possession for the insured* until a certain day, before which day a fire afterwards *occurred*, in which *the property was destroyed;* and the only question was whether such a policy so made not *prohibited* by law, *nor wanting any* authority in the agents, and where even the *premium had been paid or credited*, should be enforced. There would seem to be little reason or justice in a contrary doctrine. We say, amen.

The appellant's brief next cites a number of cases which we do not care to examine, because the counsel say they are to the point, that an *agent can waive the condition* in a *policy providing that it shall not be considered as binding*, until the premium is paid.

We are not aware that in this case there was even a pretense made that *any agent of the company* ever *attempted to exercise* or *claim any such authority or power*. There is certainly no evidence of any such thing. And if there had been any such action by one or more agents of this company, we should at once not only set up the declarations in the testimony of the agents themselves in this case, who negative any such claim or right, but we should fall back also upon the *published instructions*, and the laws passed which prevent it. The exact written and printed instructions on the back of all blank applications, as well as other documents issued by this company, to which we have already called the attention of this Court, establish in the most conclusive manner that no authority was claimed or exercised in the name of this company to make contracts or waive conditions.

The brief selects another case, taken from 5 Ind., 96—*Com. Mu. Ins. Co.* v. *Jenks*—where, according to the statement of appellant's brief, the company approved the application, and the policy was issued and mailed to the agent, but received by the agent one day after the death of insured. It appeared that the first year's premium was to be paid by *advertising in a paper published by insured;* and the court, in deciding the case, say—"*that the company* "*voluntarily commenced their risk more than 4 months before* "*the payment of the premium, in the mode agreed upon,* "*could possibly be completed*," &c., &c.

Now, in this case, we are unfortunate enough to see no earthly cause for its citation. It refutes nothing. There lacks any parallel in facts in either the reasons of the court, or the logic of the circumstances. The company in this case at bar *never waived any payment* or *accepted any equivalent* of payment from Mr. Giddings, that relieved him from the *first payment* of the premium, the same as stipulated, to make him a *member* of the corporation and the

company. The policy was never sent to any agent to be delivered, or take effect, without this payment in money. In the case cited, there was no prohibition of public law—in the charter—which prevented the company or its agents from waiving the *indispensable* fact—condition of payment required in every case of a first *insurance—which, in this company*, made the insured a corporator entitled to certain benefits—sharer *in certain profits* of the Mutual Insurance Company, incorporated under the laws of Wisconsin.

Now what bearing a case may be expected to have in this court, not touching some one of the controverted material points at issue in the case at bar, because cited from Indiana—we do not comprehend; and perhaps, this is not expected of us.

The case cited from 9 How., 390, *Taylor* v. *Merchants Fire Ins. Co.*, is sound upon principle, but why it should be cited against us in this case, we cannot understand. It was a case of fire insurance. The terms were proposed first by the underwriters themselves, and then were accepted by letter mailed and in writing next day and before a fire occurred, it being held such an acceptance by mail had *made a complete contract*, as would be held by nearly all the books on contracts.

Cases not in point.

We forbear the further investigation of the authorities cited, as there are few remaining, and they are of less weight and less authority even. We will now address ourselves to the argument of the *case at bar*.

As we think, we have shown in this reply that the counsel of appellants have framed their entire argument upon an erroneous assumption or misapprehension of the case. They would seem to desire this court to assume according to their statement, that before the death of Giddings,

a *valid contract had been, in fact, made* with him by this company, and forthwith, as if this had been established, they bring to their aid, all the cases, where the minds of the *respective parties had met in agreement, to certain stipulations*, and one of the parties had controverted his liability only in respect to some *technical qualification* required to validate such an agreement.

The court will, however, observe that in the *case at bar*, the *assent* or consent of *Mr. Giddings, deceased, had never been given by act, so asto bind the company*, according to the conditions proposed to be first observed on his own part.

The application presented for the insurance, did not stipulate even the amount of premium to be paid, because Mr. Giddings' agent, Roberts, had stated it might be *about $300.*

But the rate of insurance was never absolutely fixed, until the company itself acted, and then it was placed at $302.50 by the only persons who could authoritatively do so.

Again, when the company acted, *it only* accepted the application on certain *express conditions*:

(1.) The condition that the applicant should be *in life and health* the same as he *represented himself;* and

(2.) That when any policy was to be issued upon any application, the policy was made out containing the express clause, as required by the Statute of Incorporation: "*That* " *it should* not take effect and become binding on the com- " pany, until the premium was actually paid during the " life-time of the person whose life was assured, to some " person authorized to receive it, who shall countersign the " policy on receipt of the premium." See

Charter of Incorporation, Record, p. 86, Secs. 4 and 7.

Also Copy Policy, Record, p. 101.

Also Copy Application, signed by applicant, Rec., p. 106.

To which we might add the evidence of Dean, Payne, Merrill, the secretary of company, at Milwaukee, and Truman H. Day and others, on this record. The uniform obligation and duty of all these agents is etablished, and the practice of the company had never failed or been deviated from in any single instance. There is not a *pretense* that such had been the case.

When, therefore, the proof in this case established that on the 15th day of August, 1872, *nine days before the company acted* upon the application, the applicant was taken sick, so that on the 24th day of August, he *was dying*, and did in fact die in consequence of that sickness, on the 4th of September, the court below, as we have shown in our former brief, (page 17,) thought that objection alone sufficient to dispose of the case, and dismissed the bill.

THE LAW OF THE CASE—AS WE HAVE UNDERSTOOD IT. ITS APPLICATION TO THE CASE AT BAR, AS WE NOW UNDERSTAND THE CASE.

In our original brief, under the head of "*Legal Argument*," page 17, we have made very full and ample citations to a large number of cases, which we supposed would be authority as applicable to the actual point or points in controversy, which this Court of the highest jurisdiction in the United States could be called upon to finally decide.

Let us, again, without unnecessarily swelling the size of this brief, refer to them.

(*At page* 18, we have Judge BLODGETT's reasons for dismissing the bill below.)

(*At page* 19, we have cited the case from this Court, in 2 Otto, *Piedmont Life Ins. Co.* v. *Ewing*, 2 Otto, 380.)

In this case, Justice MILLER applies to the cases cited in that case an analysis, which we might well apply in this case to many of appellant's citations. He says:

"This case differs very widely from those cited, in which "a delay in payment has been treated by the court as "waived.

"All such cases proceed on the ground that there has "been a valid agreement as to terms. In most of them, "one or two premiums have been paid, and the delaying "payment subsequently has been waived or accounted for, "or the amount of *the first payment* having been agreed "upon, the agent, or some one for the company, has so "acted with the assured in the matter *as to show consent to* "*delay*."

The practical sense of this language so precisely comprehends all that we could say, and all we should perhaps have said, that we repeat it in this reply.

(*At page* 22.) We call attention to the case in 18 Minnesota, *Schwarz* v. *German Life Ins. Co.*, precisely of similar bearing as this one.

(*At page* 24.) We call attention to the case in point, 118 Mass., 178, the case of *Eliza I. Mackey* v. *Mutual Benefit Life Ins. Co.*, in which it is held, that the only form of contract contemplated by parties, being a policy to be issued upon payment of premium — and no delivery having been made on account of *non-payment* — it was held there was *no contract* of insurance.

(*At page* 25 *of original brief.*) We have called attention to the case decided in this Court in 23 Wallace, 106, in which Justice SWAYNE shows the duty of the applicant for insurance, to keep up necessary communication *with* an agent, as to the delivery of policy, and that in any light in

which the agent's fault to communicate with an applicant can be viewed, "*such fault cannot be taken as the legal* "*equivalent of the assent of the applicant to the terms of the* "*policy.*"

(*At page 28 of original brief.*)

After citing the above U. S. Court cases, we take up the law, as to the general rule in life insurance, to show that *Mr. Bliss*, in his elementary book on this subject (see *Bliss on Life Insurance, page 230*), lays down the universal rule.

In all companies of life insurance the policy provides, " that it is not to take effect until the *first premium* is paid, " In such cases, if there is no *actual delivery of the policy*, " under such circumstances that a waiver of premium may " be presumed, there must be some satisfactory proof that " the *premium was so paid*, or that its payment was *in fact* " *waived.*"

To this the brief adds in support, *sixteen* several cases decided in the courts of Mass., Penn., N. C., Md., Ga., Iowa, Conn. and Indiana, to which we beg this Court's attention.

In one of the cases cited, *Collins* v. *Ins. Co.*, 7 Phil. Rep., 201, an application had been made through an agent, and the policy had been sent to the agent, Manning, and in that case, as in this, there was a claim set up that a delivery to the agents was a delivery to the applicant, although premium was not paid as required.

The court held in deciding the contrary, this language: " It might as well be contended that a shop-keeper is " bound by a receipted bill sent to the house of a customer " who does not find it convenient to pay, as that in this " case the policy should be considered as taking effect, be- " cause it recited payment, *when its delivery* was made " *conditional upon payment.*

"Without delivery, it is merely *inchoate*, and of no more "real value in the scales of proof than an unuttered "thought or a design which is not executed."

Howell v. *Knickerbocker Life Ins. Co.*, 44 N. Y., 277, as to annual payments, where each payment is to be made on or before a specified day, held, a *condition precedent*, which, if not performed, though hindered by "act of God," the policy was to be no longer a contract in force, because condition not performed on the day named.

The Last Argument.

The last argument or point made in our original brief had an equitable bearing, but applied to the whole of appellant's case. We insist that the company appellee in this case has never been *put in default*, nor in a *single instance did or omitted to do anything* of which Mr. Giddings, the applicant (if living), could complain.

But, on the contrary, in the case of these appellants, the rule of equity jurisprudence is specially to be applied.

Mr. Story (Equity Jusp., Sec. 736) "lays down the rule "in all cases, that in cases of covenant and other contracts "where a *specific performance is sought*, it is often material "to consider how far the reciprocal obligations of the "party seeking the relief have been fairly and fully per- "formed. For if the latter have been disregarded, or they "are incapable of being substantially performed on the "part of the *party seeking relief*, or from their nature they "have ceased to have any just application, courts of "equity will not interfere."

In the bill filed there is no averment or allegation or pretense of fact, that deceased, Mr. Giddings, had in his lifetime *paid, or offered to pay*, the *premium*, while the proofs of his death show that when the policy was received in Chicago for delivery, in case he had come forward on his

part to perform by payment, he then lay stricken down with the disease of which he died in ten days after! Had the policy been delivered to any agent of this dying man while the knowledge of his death was withheld or his sickness concealed, on the 24th day of August, when this company proceeded in good faith to decide upon the application as if he were the same man represented to be in a condition of sound health, would the policy have been more valid? Under the cases cited by us, it certainly would not. The contract made under such circumstances would have been fraudulent and void. And this would have been so, even had the policy been delivered, and some agent paid the premium, during the last sickness of Giddings, as this Court decided in the case of *Piedmont Life Ins. Co.* v. *Ewing*, 2 Otto, 380. The representatives of Mr. Giddings dead, may claim more than Mr. Giddings living, but the law remains the same in either case. The record now before this Court shows that Mr. Giddings never expected *to pay* any premium, or to obtain any insurance, unless the company furnished him the money in making the loan he *expected*. Now, since he did not succeed in obtaining his loan, and he died without paying the premium on a policy, why should the appellants, mere strangers, have the amount of this insurance? There can be no specific performance of a contract never made, nor equally of one where the complainants themselves cannot aver, on their part, full performance according to its terms.

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